SECTION-BY-SECTION ANALYSIS

Section 1. Short Title; References; Table of Contents

The title of the bill is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 (hereinafter the "Act").

TITLE I. NEEDS-BASED BANKRUPTCY Section 101. Conversion

Section 101 amends section 706(c) of the Bankruptcy Code to allow a chapter 7 case to be converted to a case under chapter 12 or chapter 13 on consent of the debtor.

Section 102. Dismissal or conversion

Section 102 implements the Act's needs-based bankruptcy reforms. Subsection (a) amends section 707(b) of the Bankruptcy Code to permit a court, on its own motion, or on motion of the United States trustee, trustee, bankruptcy administrator, or party in interest, to dismiss on the basis of abuse a chapter 7 case filed by an individual debtor whose debts are primarily consumer debts. Alternatively, it permits the United States trustee, trustee, bankruptcy administrator, or party in interest to seek conversion of a chapter 7 case to a case under chapter 11 or chapter 13 on consent of the debtor. Under current law, only the court or the United States Trustee may seek dismissal of a chapter 7 case under section 707(b) for substantial abuse.

In addition, section 102(a) replaces the current law's presumption in favor of the debtor with a mandatory presumption of abuse that is triggered under certain conditions. Section 102(a) requires a court to presume that abuse exists if the amount remaining, after certain expenses and other specified amounts are deducted from the debtor's current monthly income (a defined term), when multiplied by 60, exceeds (1) 25 percent of the debtor's nonpriority unsecured claims, or $6000 (whichever is greater); or (2) $10,000, whichever is lower. Under section 102(a), the debtor's monthly expenses -- exclusive of any payments for debts (unless otherwise permitted) -- must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook as Necessary Expenses under the National and Local Standards categories and the debtor's actual monthly expenditures for items categorized as Other Necessary Expenses in the Internal Revenue Service Financial Analysis Handbook. For purposes of this provision, the expenses include those of the debtor, the debtor's dependents, and the debtor's spouse, if not otherwise a dependent.

Section 102(a) mandates that the debtor's monthly expenses include reasonably necessary expenses incurred to maintain the safety of the debtor and the debtor's family from family violence as identified in section 309 of the Family Violence Prevention and Services Act or other applicable law. In addition, the debtor may deduct up to an additional five percent of the food and clothing expense allowances under the National Standards category, if demonstrated to be reasonable and necessary.

For purposes of determining whether the mandatory presumption of abuse applies under the needs-based test, section 102(a) permits the debtor to deduct certain other liabilities. These include the debtor's average monthly payments on account of secured debts, calculated as the total of all amounts scheduled as contractually due over the 60-month period following the filing

of the bankruptcy, divided by 60 months. This amount may include any additional payments to secured creditors that a chapter 13 debtor must make to retain possession of a primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents. With respect to claims and expenses entitled to priority under section 507 of the Bankruptcy Code, section 102(a) specifies that the debtor may deduct payments for these obligations, calculated as the total amount of all priority debts, divided by 60. If applicable, the debtor may deduct the following additional expenses:

(1) the continuation of actual expenses paid by the debtor that are reasonable and necessary for the care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family who is unable to pay such expenses;

(2) the actual administrative expenses (including reasonable attorneys' fees) of administering a chapter 13 plan for the district in which the debtor resides, up to ten percent of projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees; and

(3) the actual expenses for each dependent child under the age of 18 years up to $1,500 per year per child to attend a private elementary or secondary school, if the debtor documents these expenses and provides a detailed explanation of why they are reasonable and necessary.

The mandatory presumption of abuse may only be rebutted if (1) the debtor demonstrates special circumstances that justify any additional expense or adjustment to the debtor's current monthly income for which there is no reasonable alternative; and (2) such additional expense or income adjustment causes the debtor's current monthly income (reduced by various amounts) when multiplied by 60 to be less than the lesser of either (i) 25 percent of the debtor's nonpriority unsecured claims, or $6,000 (whichever is greater), or (ii) $10,000. The debtor must itemize and provide documentation of each additional expense or income adjustment and an explanation of the special circumstances that make such expense or income adjustment reasonable and necessary. In addition, the debtor must attest under oath to the accuracy of any information provided to demonstrate that such additional expenses or adjustments to income are required.

Section 102(a) specifies that the debtor file a statement of current monthly income and the calculations that determine whether a presumption arises under this provision as part of the schedules that the debtor must file pursuant to section 521 of the Bankruptcy Code. The statement must also explain how each amount is calculated.

Where the mandatory presumption of abuse does not apply or has been rebutted, the court, in order to determine whether the granting of relief under chapter 7 would be an abuse of such chapter, must consider (1) whether the debtor filed the chapter 7 case in bad faith; or (2) whether the totality of circumstances of the debtor's financial situation (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection) demonstrates abuse.

Should a court grant a section 707(b) motion made by a trustee and find that the action of debtor's counsel in filing the chapter 7 case violated Federal Rule of Bankruptcy Procedure 9011, section 102(a) mandates that the court order the attorney to reimburse the trustee for all reasonable costs in prosecuting the motion, including reasonable attorneys' fees. In addition, if the court finds that the debtor's attorney violated Rule 9011, the court, at a minimum, must assess an appropriate civil penalty, payable to the trustee, bankruptcy administrator, or the United States trustee.

Section 102(a) specifies that the signature of an attorney on a bankruptcy petition, pleading, or written motion constitutes a certification that the attorney has (1) performed a reasonable investigation into the circumstances giving rise to such petition, pleading or motion;

and (2) determined that the document is well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and does not constitute an abuse under section 707(b)(1) of the Bankruptcy Code. Pursuant to section 102(a), the signature of an attorney on a bankruptcy petition constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

A court may award a debtor all reasonable costs, including reasonable attorneys' fees, incurred by the debtor in successfully contesting a section 707(b) motion brought by a party in interest (other than a trustee, United States trustee or bankruptcy administrator) if the court finds that either (1) the action of the party in filing the motion violated Rule 9011 or (2) the party filed the motion solely for the purpose of coercing the debtor into waiving a right guaranteed to the debtor under the Bankruptcy Code. An exception with respect to the Rule 9011 ground applies to a small business having an aggregate claim of less than $1,000. For purposes of this provision, a small business is defined as an unincorporated business, partnership, corporation, association, or organization with less than 25 full-time employees that is engaged in commercial or business activity. The number of employees of a wholly-owned subsidiary of a corporation includes the employees of the subsidiary's parent corporation and any other subsidiary corporation of the parent corporation.

Two forms of "safe harbors" are recognized under section 102(a). One provides that only a judge, United States trustee, bankruptcy administrator, or trustee may bring a motion under section 707(b) of the Bankruptcy Code if the chapter 7 debtor's income (or in a joint case, the income of debtor and the debtor's spouse) does not exceed the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household. The second safe harbor provides that no motion under section 707(b)(2) may be filed by a judge, United States trustee, bankruptcy administrator, trustee, or other party in interest if the debtor and the debtor's spouse combined have income that does not exceed the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household.

Section 102(b) defines "current monthly income" as the average monthly income from all sources that the debtor receives (or, in a joint case, the debtor and the debtor's spouse receive), without regard to whether it is taxable income, in the six-month period preceding the date of determination. It includes any amount paid on a regular basis by any entity (other than the debtor or, in a joint case, the debtor and the debtor's spouse) to the household expenses of the debtor or the debtor's dependents and, in a joint case, the debtor's spouse, if not otherwise a dependent. It excludes Social Security Act benefits and payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes.

Section 102(c) amends section 704 to require the United States trustee or bankruptcy administrator to review all materials filed by an individual chapter 7 debtor and to file with the court not later than ten days after the date of the first meeting of creditors a statement as to whether or not the case should be presumed to be an abuse under section 707(b). The court, in turn, must provide a copy of such statement within five days of its filing to all creditors.

If the United States trustee or bankruptcy administrator determines that the debtor's case should be presumed to be an abuse under section 707(b) and the debtor's current monthly income is not less than the applicable state median income, such United States trustee or bankruptcy administrator must file within 30 days after the filing of the statement (described in

the preceding paragraph) either a (1) motion to dismiss or convert the case under section 707(b); or (2) a statement setting forth the reasons why such a motion is not appropriate. In a case where a motion to dismiss or convert or a statement is required to be filed under section 704(b)(2), the United States trustee or bankruptcy administrator may decline to file such a motion if (1) the debtor's current monthly income (when multiplied by 12) exceeds 100 percent, but does not exceed 150 percent of the applicable state median income; and (2) after subtracting certain deductions, the debtor's remaining income when multiplied by 60 is less than the lesser of (i) 25 percent of the debtor's nonpriority unsecured claims or $6,000 (whichever is greater); or (ii) $10,000.

Section 102(d) amends section 342 of the Bankruptcy Code to require the clerk to give written notice to all creditors not later than 10 days after the filing of a chapter 7 case in which the presumption of abuse applies. It is anticipated that the Judicial Conference of the United States will develop an official form to implement this provision.

Section 102(e) specifies that no provision of the Bankruptcy Code shall limit the ability of a creditor to supply information to a judge (except for information communicated *ex parte*, unless otherwise permitted by applicable law), United States trustee, bankruptcy administrator, or trustee.

Section 102(f) amends section 707 of the Bankruptcy Code to provide that a court may dismiss a chapter 7 case filed by an individual debtor convicted of a crime of violence (as defined in 18 U.S.C. 16), or a drug trafficking crime (as defined in 18 U.S.C. 924(c)(2)) on motion of the victim, if dismissal is in the best interest of such victim. The court, however, may not dismiss a case under this provision if the debtor establishes by a preponderance of the evidence that the filing of the chapter 7 case is necessary to satisfy a domestic support obligation.

Section 102(g) amends section 1325(a) of the Bankruptcy Code to require the court to find, as a condition of confirmation, that the debtor filed the chapter 13 case in good faith.

Section 102(h) amends section 1325(b) of the Bankruptcy Code to revise the definition of disposable income. As revised, the term means current monthly income received by the debtor (exclusive of child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child), less amounts reasonably necessary to be expended for (1) the maintenance or support of the debtor or dependent of the debtor; (2) a domestic support obligation that first becomes due after the petition is filed; (3) certain charitable contributions; and (4) if the debtor is engaged in business, the payment of expenditures necessary for the continuation, preservation, and operation of such business. If the debtor's income exceeds the applicable state median income threshold, then the expenses of the debtor under this provision are determined in accordance with section 707(b)(2)(A) and (B), which specifies what monthly expenses a debtor may claim.

Section 102(i) makes a clerical amendment to the table of sections.

Section 103. Sense of Congress and study

Section 103(a) states that it is the sense of Congress that the Secretary of the Treasury has the authority to alter the Internal Revenue Service expense standards established to set guidelines for repayment plans as needed to accommodate their use under section 707(b) of the Bankruptcy Code.

Section 103(b) requires the Director of the Executive Office for United States Trustees to submit a report, not later than two years from the enactment date of the Act, containing findings with regard to the use of the Internal Revenue Service expense standards for determining a debtor's current monthly expenses under section 707(b) of the Bankruptcy Code and the impact that these standards have on debtors and the bankruptcy courts. The report may include recommendations for amendments to the Bankruptcy Code consistent with the Director's findings.

Section 104. Notice of alternatives

Section 104 amends section 342(b) of the Bankruptcy Code to require the clerk to give an individual with primarily consumer debts -- *before* he or she files for bankruptcy relief -- notice of the following:

(1) a brief description of the various forms of bankruptcy relief, including an explanation of the general purpose, benefits, and costs of proceeding under each form of relief;
(2) a brief description of the services available from credit counseling agencies;
(3) a statement explaining that a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury shall be subject to fine, imprisonment, or both; and
(4) a statement explaining that all information supplied by a debtor in connection with the case is subject to examination by the Attorney General.

Section 105. Debtor financial management training test program

Section 105(a) requires the Director of the Executive Office for United States trustees to (1) consult with debtor education experts and others who operate financial management education programs; and (2) develop a financial management training curriculum and materials to teach individual debtors how to manage their personal finances better.

Section 105(b) requires the Director to select six judicial districts to test the effectiveness of such curriculum and materials for an 18-month period beginning not later than 270 days after the Act's enactment date. The curriculum and materials shall be used in these six districts as the personal financial management instructional course required by section 111 of the Bankruptcy Code, as added by the Act.

Section 105(c) requires the Director to evaluate the effectiveness of the curriculum and materials as well as to assess the effectiveness of a sample of existing consumer education programs (such as those described in the Report of the National Bankruptcy Review Commission) that are representative of consumer education programs sponsored by the credit industry, chapter 13 trustees, and consumer counseling groups. Not later than 3 months after concluding such evaluation, the Director must submit a report on the effectiveness and cost of such curriculum, materials, and programs.

Section 106. Credit counseling

Section 106(a) amends section 109 of the Bankruptcy Code to require, as a condition for eligibility to be a debtor, an individual receive credit counseling within the 180-day period preceding the filing of a bankruptcy case by such individual. The credit counseling must be provided by an approved nonprofit budget and credit counseling agency consisting of either an individual or group briefing (which may include a briefing conducted telephonically or via the

Internet) that outlines opportunities for available credit counseling and assists the individual in performing a budget analysis.

The determination by the United States trustee or bankruptcy administrator with regard to whether approved nonprofit budget and credit counseling agencies in that district are not reasonably able to provide adequate services must be reviewed annually. The United States trustee or bankruptcy administrator, however, may disapprove a nonprofit budget and credit counseling service at any time.

The mandatory credit counseling requirement does not apply if the debtor resides in a district where the United States trustee or bankruptcy administrator determines that the approved nonprofit budget and credit counseling agencies in that district are not reasonably able to provide adequate services.

In addition, this requirement does not apply if the debtor files a certification that (1) describes exigent circumstances meriting a waiver of this requirement, (2) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain such services within the five-day period beginning on the date the debtor made the request, and (3) is satisfactory to the court. This exemption terminates when the debtor meets the requirements for credit counseling participation, but not longer than 30 days after the case is filed, unless the court, for cause, extends this period for an additional 15 days.

Section 106(b) amends section 727(a) of the Bankruptcy Code to provide that a chapter 7 debtor's discharge must be denied if the debtor fails to complete a personal financial management instructional course after the filing of the bankruptcy case. This provision, however, does not apply if the debtor resides in a district where the United States trustee or bankruptcy administrator has determined that the approved instructional courses in that district are not adequate. Such determination must be reviewed annually by the United States trustee or bankruptcy administrator.

Section 106(c) amends section 1328 of the Bankruptcy Code to add a chapter 13 debtor's failure to complete an instructional course concerning personal financial management as a ground for denying a discharge, unless the debtor resides in a district where the United States trustee or bankruptcy administrator has determined that the approved instructional courses in that district are not adequate. Such determination must be reviewed annually by the United States trustee or bankruptcy administrator.

Section 106(d) amends section 521 of the Bankruptcy Code to mandate that an individual debtor file with the court a certificate from the approved nonprofit budget and credit counseling agency that rendered the requisite services described under section 109(h), as added by this Act. The debtor must file a copy of the repayment plan, if any, that was developed by the agency together with the certificate, which must describe the services rendered.

Section 106(e) adds a new provision to the Bankruptcy Code requiring the clerk for each district to maintain for the public's use a list of approved (1) credit counseling agencies that provide the services described in section 109(h) of the Bankruptcy Code, as added by this Act; and (2) personal financial management instructional courses. Under this provision, the United States trustee or bankruptcy administrator may only approve a credit counseling agency or personal financial management instructional course that satisfies certain specified criteria. If such agency or instruction course is approved, the approval may only be for a probationary period of up to six months. At the conclusion of the probationary period, the United States trustee or bankruptcy administrator may only approve such agency or instructional course for an additional one-year period and thereafter for successive one-year periods. Within 30 days after

any final decision occurring after the expiration of the initial probationary period or after any two-year period thereafter, an interested person may seek judicial review of such decision in the appropriate United States district court.

In addition, section 106(e) provides that the United States district court may, at any time, investigate the qualifications of a credit counseling agency and request it to produce documents to ensure the agency's integrity and effectiveness. The district court may remove a credit counseling agency from the approved list that does not meet the specified qualifications. Section 106(e) prohibits a credit counseling agency from providing information as to whether an individual debtor has received or sought personal financial management instruction from such agency to a credit reporting entity.

A credit counseling agency that willfully or negligently fails to comply with any requirement under the Bankruptcy Code with respect to a debtor shall be liable to the debtor for damages in an amount equal to (1) actual damages sustained by the debtor as a result of the violation and (2) any court costs or reasonable attorneys' fees incurred to recover such damages.

Section 106(f) amends section 362 of the Bankruptcy Code in two respects. First, it provides that if a chapter 7, 11, or 13 case is dismissed due to the creation of a debt repayment plan, the presumption under section 362(c)(2) shall not apply to any subsequent bankruptcy case commenced by the debtor. Second, it directs that the court, on request of a party in interest, must issue an order under section 362(c) confirming that the automatic stay has terminated.

Section 107. Schedules of reasonable and necessary expenses

Section 107 requires the Director of the Executive Office for United States Trustees to issue schedules of reasonable and necessary administrative expenses (including reasonable attorneys' fees) relating to the administration of a chapter 13 plan for each judicial district.

TITLE II. ENHANCED CONSUMER PROTECTION

SUBTITLE A. PENALTIES FOR ABUSIVE CREDITOR PRACTICES

Section 201. Promotion of alternative dispute resolution

Section 201(a) amends section 502 of the Bankruptcy Code to permit the court, after a hearing on motion of the debtor, to reduce a wholly unsecured consumer claim by up to 20 percent if the debtor can establish by clear and convincing evidence that the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved credit counseling agency on behalf of the debtor. The debtor must also establish by clear and convincing evidence that the offer was made at least 60 days before the filing of the petition. In addition, the offer must have provided for payment of at least 60 percent of the amount of the claim over a period not exceeding the loan's repayment period, or a reasonable extension thereof. Further, no part of the claim under the alternative repayment schedule may be nondischargeable.

Section 201(b) amends section 547 of the Bankruptcy Code to prohibit the avoidance as a preferential transfer a payment by a debtor to a creditor pursuant to an alternative repayment plan created by an approved credit counseling agency.

Section 202. Effect of discharge

Section 202 amends section 524 of the Bankruptcy Code in two respects. First, it makes the willful failure of a creditor to credit payments received under a confirmed chapter 11, 12, or 13 plan a violation of the discharge injunction if the creditor's action to collect and failure to credit payments caused material injury to the debtor. This provision does not apply if the plan is dismissed or in default, or where the creditor did not receive payments pursuant to the plan.

Second, section 202 amends section 524 of the Bankruptcy Code to provide that the discharge injunction does not apply to an act by a creditor having a claim secured by an interest in real property that is the debtor's principal residence if such act is (1) in the ordinary course of business between the creditor and the debtor; and (2) limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of the creditor pursuing *in rem* relief to enforce the underlying lien.

Section 203. Discouraging abuse of reaffirmation practices

Section 203 consists of a comprehensive overhaul of the law applicable to reaffirmation agreements. Section 203(a) mandates the provision of certain specified disclosures, which are the only disclosures required in connection with a reaffirmation agreement. These disclosures must be in written form and be made clearly and conspicuously. In addition, the disclosure statement must include certain advisories and explanations. At the election of the creditor, the disclosure statement may include a repayment schedule. If the debtor is represented by counsel, section 203(a) mandates that the attorney file a certification stating, *inter alia*, that the agreement represents a fully informed and voluntary agreement by the debtor, that the agreement does not impose an undue hardship on the debtor or any dependent of the debtor, and that the attorney advised the debtor of the legal effect and consequences of such agreement. Where the presumption of undue hardship applies, the attorney must also certify that it is his or her opinion that the debtor is able to make the payments required under the reaffirmation agreement. Further, the debtor must submit a statement setting forth the debtor's monthly income and expenditures. If the debtor is represented by counsel and the debt being reaffirmed is owed to a credit union, a modified version of this statement may be used.

Notwithstanding any other provision of the Bankruptcy Code, section 203(a) permits a creditor to (1) accept payments from a debtor before and after the filing of a reaffirmation agreement with the court; and (2) accept payments from a debtor pursuant to a reaffirmation agreement that the creditor believes in good faith to be effective. It further provides that certain specified disclosure requirements shall be satisfied if such disclosures are given in good faith.

If the amount of the scheduled payment due on the reaffirmed debt (as disclosed in the debtor's statement) is greater than the debtor's available income, it is presumed for 60 days from the date on which the reaffirmation agreement is filed with the court that the agreement presents an undue hardship. Section 203(a) requires the court to review such presumption, which can be rebutted if the debtor identifies in writing additional sources of funds that would enable the debtor to make the required payments on the reaffirmed debt. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove the reaffirmation agreement. No reaffirmation agreement may be disapproved without notice and hearing to the debtor and creditor. The hearing must be concluded before the entry of the debtor's discharge. The requirements set forth in this paragraph do not apply to reaffirmation agreements where the creditor is a credit union, as defined.

Section 203(b) requires the Attorney General to designate a U.S. attorney for each judicial district and an Federal Bureau of Investigation agent for each field office to have primary law enforcement responsibility for violations of sections 152 and 157 of title 18 of the United States Code with respect to abusive reaffirmation agreements and materially fraudulent statements in bankruptcy schedules that are intentionally false or misleading. The U.S. attorney designated under this provision has primary responsibility with respect to bankruptcy investigations under section 3057 of title 18, United States Code. The bankruptcy courts must establish procedures for referring any case in which a materially fraudulent bankruptcy schedule has been filed. The provision also makes a clerical amendment to the table of sections in title 18.

SUBTITLE B. PRIORITY CHILD SUPPORT

Section 211. Definition of domestic support obligation

Section 211 amends section 101 of the Bankruptcy Code to define a domestic support obligation as a debt that accrues pre- or postpetition (including interest that accrues pursuant to applicable nonbankruptcy law) and is owed to or recoverable by a spouse, former spouse, or child of the debtor, or that child's parent or legal guardian, or a responsible relative. It also includes a debt owed to or recoverable by a governmental unit. To qualify as a domestic support obligation, the debt must be in the nature of alimony, maintenance, or support, without regard to whether such debt is expressly so designated. It must be established or subject to establishment either pre- or postpetition pursuant to a (i) separation agreement, divorce decree, or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit. It does not apply to a debt assigned to a nongovernmental entity, unless it was assigned voluntarily by the spouse, former spouse, child, or parent solely for the purpose of collecting the debt.

Section 212. Priorities for claims for domestic support obligations

Section 212 amends 507(a) of the Bankruptcy Code to make domestic support obligations owed to or recoverable by a spouse, former spouse, or child of the debtor, or the parent, legal guardian, or responsible relative of such child or filed by a governmental unit on behalf of such person payable before all other expenses and claims, including expenses of administration from the assets of a bankruptcy estate. Within this priority, allowed claims for domestic support obligations filed by a governmental unit must be paid on the condition that funds received by such unit under this provision be applied and distributed in accordance with nonbankruptcy law. Remaining funds may be used to pay a domestic support obligation assigned to a governmental unit (unless such obligation is assigned voluntarily by a spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or owed directly to such entity if the funds are applied and distributed in accordance with applicable nonbankruptcy law.

Section 213. Requirements to obtain confirmation and discharge in cases involving domestic support obligations

Section 213(1) amends section 1129(a) of the Bankruptcy Code to mandate the payment of certain postpetition domestic support obligations as a condition of confirmation in a chapter 11 case. Section 213(2) amends section 1208(c) of the Bankruptcy Code to provide that the failure of a chapter 12 debtor to pay a postpetition domestic support obligation constitutes cause for conversion or dismissal of the debtor's case. Section 213(3) amends section 1222(a) of the Bankruptcy Code to permit a chapter 12 debtor to propose a plan that provides for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) if all of the debtor's projected disposable income for a five-year period is applied to make payments under the plan. Section 213(4) amends section 1222(b) of the Bankruptcy Code to permit a chapter 12 debtor, pursuant to a plan, to pay postpetition interest on claims that are nondischargeable under Section 1328(a), but only to the extent that the debtor has disposable income available to pay such interest after payment of all allowed claims. Section 213(5) amends section 1225(a) of the Bankruptcy Code to require a chapter 12 debtor to be current with certain postpetition domestic support obligations as a condition of confirmation. Section 213(6) amends section 1228(a) to condition the granting of a chapter 12 discharge on the debtor's payment of certain postpetition domestic support obligations. Section 213(7) amends section 1307 of the Bankruptcy Code to add nonpayment of a postpetition domestic support obligation as a ground for conversion or dismissal of a chapter 13 case. Section 213(8) amends section 1322(a) to permit a chapter 13 debtor, pursuant to a plan, to pay less than the full amount of a claim entitled to priority under section 507(a)(1)(B) if the plan provides that all of the debtor's projected disposable income over a five-year period will be applied to make payments under the plan. Section 213(9) amends section 1322(b) to permit a chapter 13 debtor, pursuant to a plan, to pay postpetition interest on claims that are nondischargeable under section 1328(a), but only to the extent that the debtor has disposable income available to pay such interest after payment of all allowed claims. Section 213(10) amends section 1325(a) of the Bankruptcy Code to require, as a condition of confirmation, that a chapter 13 debtor pay certain postpetition domestic support obligations. Section 213(11) amends section 1328(a) of the Bankruptcy Code to condition the granting of a chapter 13 discharge on the debtor's payment of certain postpetition domestic support obligations.

Section 214. Exceptions to automatic stay in domestic support proceedings

Section 214 amends section 362(b) of the Bankruptcy Code to except from the automatic stay actions or proceedings pertaining to child custody and visitation, domestic violence, and marriage dissolution to the extent that they do not pertain to property determinations concerning property of the estate. In addition, section 214 amends section 362(b) to except from the automatic stay the withholding, suspension, or restriction of a driver's license, or a professional, occupational or recreational license under state law pursuant to section 466(a)(16) of the Social Security Act. Further, section 214 excepts from the automatic stay the reporting of overdue support owed by a parent to any consumer reporting agency pursuant to section 466(a)(7) of the Social Security Act; the interception of tax refunds as authorized by sections 464 and 466(a)(3) of the Social

Security Act; and the enforcement of medical obligations as specified under title IV of the Social Security Act.

Section 215. Nondischargeability of certain debts for alimony, maintenance, and support

Section 215 amends section 523(a)(5) of the Bankruptcy Code to provide that a "domestic support obligation" (as defined in section 211 of the Act) is nondischargeable. With respect to obligations that are not domestic support obligations, but incurred in connection with a divorce or separation or related action, section 215 provides that these obligations are also nondischargeable irrespective of the debtor's inability to pay such debts. In addition, section 215 amends section 523(c) of the Bankruptcy Code to delete the reference to section 523(a)(15).

Section 216. Continued liability of property

Section 216 amends section 522(c) of the Bankruptcy Code to make exempt property liable for nondischargeable domestic support obligations notwithstanding any contrary provision of applicable nonbankruptcy law. It also makes a conforming amendment to section 522(f)(1)(A) of the Bankruptcy Code and corrects an erroneous statutory reference in section 522(g)(2).

Section 217. Protection of domestic support claims against preferential transfer motions

Section 217 makes a conforming amendment to section 547(c)(7) of the Bankruptcy Code, which provides that a bona fide payment of a debt for a domestic support obligation may not be avoided as a preferential transfer.

Section 218. Disposable income defined

Section 218(a) amends section 1225(b)(2)(A) of the Bankruptcy Code to provide that disposable income in a chapter 12 case does not include payments for postpetition domestic support obligations.

Section 218(b) amends section 1325(b)(2)(A) of the Bankruptcy Code to provide that disposable income in a chapter 13 case does not include payments for postpetition domestic support obligations.

Section 219. Collection of child support

Section 219 amends sections 704, 1106, 1202, and 1302 of the Bankruptcy Code to require trustees in chapter 7, 11, 12, and 13 cases to provide certain types of notices to child support claimants and governmental enforcement agencies. First, the trustee must notify the claimant in writing of the right to use the services of a state child support enforcement agency established under sections 464 and 466 of the Social Security Act in the state where the claimant resides and include the agency's address and telephone number. The notice must also explain the claimant's right to payment under the applicable chapter of the Bankruptcy Code. Second, the trustee must provide written notice to the governmental enforcement agency of the name, address, and telephone number of the child support claimant. Third, the trustee must notify both

the child support claimant and the state agency that the debtor was granted a discharge as well as supply them with the debtor's last known address, the last known name and address of the debtor's employer, and the name of each creditor holding a debt that is not discharged under section 523(a)(2), (4) or (14A) or holding a debt that is reaffirmed pursuant to section 524 of the Bankruptcy Code. If a child support claimant or state agency is not able to locate the debtor, such claimant or agency may request such information from a creditor holding a debt that is not discharged under section 523(a)(2), (4) or (14A) or that is reaffirmed pursuant to section 524 of the Bankruptcy Code. Section 219, in addition, provides that, notwithstanding any other provision of law, a creditor who discloses a debtor's last known address in connection with such request is not liable to the debtor or any other person by reason of making that disclosure.

Section 220. Nondischargeability of certain educational benefits and loans

Section 220 amends section 523(a)(8) of the Bankruptcy Code to provide that a debt for a qualified education loan (as defined in section 221(e)(1) of the Internal Revenue Code) is nondischargeable, unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents.

SUBTITLE C. OTHER CONSUMER PROTECTIONS

Section 221. Amendments to discourage abusive bankruptcy filings

Section 221 makes a series of amendments to section 110 of the Bankruptcy Code. First, it clarifies the definition of a bankruptcy petition preparer with respect to persons under the direct supervision of an attorney. Second, it amends subsections (b)(1) and (c)(2) of section 110 to provide that if a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the preparer must sign certain documents filed in connection with the bankruptcy case as well as state the person's name and address on such documents. Third, it requires a bankruptcy petition preparer to give the debtor written notice explaining that the preparer is not an attorney and may not practice law or give legal advice. The notice may include examples of legal advice that a preparer may not provide. The notice, which must be signed by the preparer under penalty of perjury and the debtor, is required to be filed with any document for filing. Fourth, it requires the Supreme Court to promulgate rules or the Judicial Conference of the United States to issue guidelines for setting maximum fees. Fifth, it specifies that the bankruptcy petition preparer file a declaration certifying that the preparer complied with the notification requirements concerning the preparer's fees. Sixth, it requires the court to order the turnover of specified fees for services rendered within 12 months of the filing if such fees violate any rule or guideline. Seventh, it allows a debtor to exempt fees recovered under this provision pursuant to section 522(b) of the Bankruptcy Code. Eighth, it specifically authorizes the court to enjoin a bankruptcy petition preparer who has failed to comply with a prior order issued under section 110. Ninth, it generally revises section 110's penalty provisions and specifies that the penalties are to be paid to a special fund of the United States trustee to pay for enforcement of this provision.

Section 222. Sense of Congress

Section 222 expresses the sense of the Congress that the states should develop personal finance curricula for use in elementary and secondary schools.

Section 223. Additional amendments to title 11, United States Code

Section 223 amends section 507(a) to add a tenth-level priority for claims based on death or personal injuries resulting from the debtor's operation of a motor vehicle or vessel while intoxicated.

Section 224. Protection of retirement savings in bankruptcy

Section 224(a) amends section 522 to permit a debtor to exempt certain retirement funds to the extent that those monies are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code and that have received a favorable determination pursuant to Internal Revenue Code section 7805. If the retirement monies are in a retirement fund that has not received a favorable determination, those monies are exempt if the debtor demonstrates that no prior unfavorable determination has been made by a court or the Internal Revenue Service, and the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code. If the retirement fund fails to be in substantial compliance with applicable law, the debtor may claim the retirement funds as exempt if the debtor is not materially responsible for such failure. This section also applies to certain direct transfers and rollover distributions. In addition, this provision ensures that the specified retirement funds are exempt under state as well as federal law.

Section 224(b) amends section 362(b) of the Bankruptcy Code to except from the automatic stay the withholding of income from a debtor's wages pursuant to an agreement authorizing such withholding for the benefit of a pension, profit-sharing, stock bonus, or other employer-sponsored plan established under Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(a) to the extent that the amounts withheld are used solely to repay a loan from a plan as authorized by section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or that they are subject to Internal Revenue Code section 72(p). The exception also applies to certain thrift savings plan loans.

Section 224(c) amends section 523(a) of the Bankruptcy Code to except from discharge any amount owed by the debtor to a pension, profit-sharing, stock bonus, or other plan established under Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(c) under a loan authorized under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or subject to Internal Revenue Code section 72(p). The exception also pertains to a loan from a thrift savings plan made under a governmental plan pursuant to section 414(d) or a contract or account under section 403(b) of the Internal Revenue Code.

Section 224(d) amends section 1322 of the Bankruptcy Code to provide that a chapter 13 plan may not materially alter the terms of a loan owed to a pension, profit-sharing, stock bonus, or other plan established under the Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(a). In addition, it specifies that any amounts required to repay such loan shall not constitute "disposable income" under section 1325 of the Bankruptcy Code.

Section 224(e) amends section 522 of the Bankruptcy Code to impose a $1 million cap (periodically adjusted pursuant to section 104 of the Bankruptcy Code to reflect changes in the

Consumer Price Index) on the value of the debtor's interest in an individual retirement account established under either section 408 or 408A of the Internal Revenue Code (other than a simplified employee pension account under section 408(k) or a simple retirement account under section 408(p) of the Internal Revenue Code) that a debtor may claim as exempt property. This limit applies without regard to amounts attributable to rollover contributions made pursuant to section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), or 403(b)(8) of the Internal Revenue Code and earnings thereon. The cap may be increased if required in the interest of justice.

Section 225. Protection of education savings in bankruptcy

Section 225(a) amends section 541 of the Bankruptcy Code to provide that funds placed not less than 365 days before the filing of the bankruptcy case in a education individual retirement account are not property of the estate if certain criteria are met. First, the designated beneficiary of such account must be a child, stepchild, grandchild or step-grandchild of the debtor for the taxable year during which funds were placed in the account. A legally adopted child or a foster child, under certain circumstances, may also qualify as a designated beneficiary. Second, such funds may not be pledged or promised to an entity in connection with any extension of credit and they may not be excess contributions (as described in section 4973(e) of the Internal Revenue Code). Third, a $5,000 cap applies to funds deposited between 720 days and 365 days before the filing date. Similar criteria apply with respect to funds used to purchase a tuition credit or certificate or to funds contributed to a qualified state tuition plan under section 529(b)(1)(A) of the Internal Revenue Code.

Section 225(b) requires a debtor to file with the court a record of any interest that the debtor has in an education individual retirement account or qualified state tuition program.

Section 226. Definitions

Section 226(a) amends section 101 of the Bankruptcy Code to add certain definitions with respect to debt relief agencies. Section 226(a)(1) defines an "assisted person" as a person whose debts consist primarily of consumer debts and whose nonexempt assets are less than $150,000. Section 226(a)(2) defines "bankruptcy assistance" as any goods or services sold or otherwise provided with the express or implied purpose of giving information, advice, or counsel; preparing documents for filing; or attending a meeting of creditors pursuant to section 341; appearing in a proceeding on behalf of a person; or providing legal representation with respect to a case or proceeding under the Bankruptcy Code. Section 226(a)(3) defines a "debt relief agency" as any person (including a bankruptcy petition preparer) who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration. The definition does not include a section 501(c)(3) nonprofit organization, depository institution, or federal credit union which provides assistance with respect to restructuring debts. In addition, the definition does not apply to an author, publisher, distributor, or seller of works subject to copyright protection under title 17 of the United States Code when acting in such capacity.

Section 226(b) amends section 104(B)(1) of the Bankruptcy Code to permit the monetary amount set forth in the definition of an "assisted person" to be automatically adjusted to reflect the change in the Consumer Price Index.

Section 227. Restrictions on debt relief agencies

Section 227 creates a new provision in the Bankruptcy Code to prohibit a debt relief agency from engaging in certain activities. First, section 227 bars the agency from failing to perform any service that it informed an assisted person would be provided. Second, this provision prohibits a debt relief agency from advising an assisted person to make an untrue or misleading statement. Third, it prohibits a debt relief agency from misrepresenting the services it provides and the benefits that an assisted person may receive as a result of bankruptcy. Fourth, section 227 bans a debt relief agency from advising an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case. Any waiver by an assisted person of the protections under this provision are unenforceable, except against a debt relief agency.

In addition, section 227 imposes penalties for the violation of section 526, 527 or 528 of the Bankruptcy Code (as enacted by this Act). First, any contract between a debt relief agency and an assisted person that does not comply with these provisions is void and may not be enforced by any state or federal court or by any person, except an assisted person. Second, a debt relief agency is liable to an assisted person, under certain circumstances, for any fees or charges paid by such person to the agency, actual damages, and reasonable attorneys' fees and costs. A chief law enforcement officer of a state having reason to believe that a person has violated or is violating section 526 may seek to have such violation enjoined and recover actual damages arising from such violation. Third, section 227 provides that the United States district court has concurrent jurisdiction of certain actions under section 526. Fourth, section 227 provides that sections 526, 527 and 528 preempt inconsistent state law. In addition, it provides that these provisions do not limit or curtail the authority of a federal court, a state, or a subdivision or instrumentality of a state, to determine and enforce qualifications for the practice of law before the federal court or under the laws of that state.

Section 228. Disclosures

Section 228 mandates that a debt relief agency provide certain written notices to an assisted person. These include the notice required under section 342(b)(1), as amended by this Act, as well as a notice advising that: (1) all information the assisted person provides in connection with the case must be complete, accurate and truthful; (2) all assets and liabilities must be completely and accurately disclosed in the documents filed to commence the case, including the replacement value of each asset (if required) after reasonable inquiry to establish such value; (3) current monthly income, monthly expenses and, in a chapter 13 case, disposable income must be stated after reasonable inquiry; and (4) information an assisted person provides may be audited and that the failure to provide such information may result in dismissal of the case or other sanction including, in some instances, criminal sanctions. In addition, the agency must supply certain specified advisories and explanations regarding the bankruptcy process. Further, this provision requires the agency to advise an assisted person (to the extent permitted under nonbankruptcy law) concerning asset valuation, the calculation of disposable income, and the determination of exempt property.

Section 229. Requirements for debt relief agencies

Section 229 requires a debt relief agency -- not later than five business days after the first date on which it provides any bankruptcy assistance services to an assisted person (but prior to such assisted person's petition being filed) -- to execute a written contract with the assisted person specifying clearly and conspicuously the services the agency will provide, the basis on which fees will be charged for such services, and the terms of payment. The assisted person must be given a copy of the fully executed and completed contract in a form the person can retain. The debt relief agency must include certain specified mandatory statements in any advertisement of bankruptcy assistance services or regarding the benefits of bankruptcy that is directed to the general public whether through the general media, seminars, specific mailings, telephonic or electronic messages, or otherwise.

Section 230. GAO study

Section 230 directs the Comptroller General of the United States to conduct a study of and to report on the feasibility, efficacy and cost of requiring a trustee to supply certain specified information about a debtor's bankruptcy case to the Office of Child Support Enforcement for the purpose of determining whether a debtor has outstanding child support obligations.

TITLE III – DISCOURAGING BANKRUPTCY ABUSE

Section 301. Reinforcement of the fresh start

Section 301 makes a clarifying amendment to section 523(a)(17) of the Bankruptcy Code concerning the dischargeability of court fees incurred by prisoners. Section 523(a)(17) was added to the Bankruptcy Code by the Omnibus Consolidated Rescissions and Appropriations Act of 1996[1] to except from discharge the filing fees and related costs and expenses assessed by a court in a civil case or appeal. Because of a drafting error, however, this provision might be construed to apply to filing fees, costs or expenses incurred by any debtor, not solely by those who are prisoners. The amendment eliminates the ambiguity and makes other conforming changes to narrow its application in accordance with its original intent.

Section 302. Discouraging bad faith repeat filings

Section 302(a) amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period. The provision does not apply to a case refiled under a chapter other than chapter 7 after dismissal of the prior chapter 7 case pursuant to section 707(b) of the Bankruptcy Code. Upon motion of a party in interest, the court may continue the stay after notice and a hearing completed prior to the expiration of the 30-day period if such party demonstrates that the latter case was filed in good faith as to the creditors who are stayed by the filing. For purposes of this provision, a case is presumptively not filed in good faith as to all creditors if:

[1] PUB. L. NO. 104-134, Section 804(b) (1996).

(1) more than one bankruptcy case under chapter 7, 11 or 13 was previously filed by the debtor within the preceding one-year period;
(2) the prior chapter 7, 11, or 13 case of the debtor was dismissed within the preceding year for the debtor's failure to (a) file or amend without substantial excuse a document required under the Bankruptcy Code or the court, (b) provide adequate protection ordered by the court, or (c) perform the terms of a confirmed plan; or
(3) there has been no substantial change in the debtor's financial or personal affairs since the dismissal of the prior case, or there is no reason to conclude that the pending case will conclude either with a discharge (if a chapter 7 case) or confirmation (if a chapter 11 or 13 case).

In addition, a case is presumptively deemed filed not in good faith as to any creditor who obtained relief from the automatic stay in the prior case or sought such relief in the prior case and such action was pending at the time of the prior case's dismissal. The presumption may be rebutted by clear and convincing evidence. A similar presumption applies if two or more bankruptcy cases were pending in the one-year preceding the filing of the pending case.

Section 303. Curbing abusive filings

Section 303(a) amends section 362(d) of the Bankruptcy Code to add a new ground for relief from the automatic stay. It provides that cause for relief from the automatic stay may be established for a creditor whose claim is secured by an interest in real estate, if the court finds that the filing of the bankruptcy case was part of a scheme to delay, hinder and defraud creditors that involved either (a) a transfer of all or part of an ownership interest in real property without such creditor's consent or without court approval; or (b) multiple bankruptcy filings affecting the real property. If recorded in compliance with applicable state law governing notice of an interest in or a lien on real property, an order entered under this provision is binding in any other bankruptcy case for two years from the date of entry of such order. A debtor in a subsequent case may move for relief based upon changed circumstances or for good cause shown after notice and a hearing. Section 303(a) further provides that any federal, state or local governmental unit that accepts a notice of interest or a lien in real property, must accept a certified copy of an order entered under this provision.

Section 303(b) amends section 362(b) of the Bankruptcy Code to except from the automatic stay an act to enforce any lien against or security interest in real property within two years following the entry of an order entered under section 362(d)(4). A debtor, in a subsequent case, may move for relief from such order based upon changed circumstances or for other good cause shown after notice and a hearing. Section 303(b) also provides that the automatic stay does not apply in a case where the debtor (a) is ineligible to be a debtor in a bankruptcy case pursuant to section 109(g) of the Bankruptcy Code; or (b) filed the bankruptcy case in violation of an order issued in a prior bankruptcy case prohibiting the debtor from being a debtor in a subsequent bankruptcy case.

Section 304. Debtor retention of personal property security

Section 304(1) amends section 521(a) of the Bankruptcy Code to provide that an individual who is a chapter 7 debtor may not retain possession of personal property securing, in

whole or in part, a purchase money security interest unless the debtor, within 45 days after the first meeting of creditors, enters into a reaffirmation agreement with the creditor, or redeems the property. If the debtor fails to so act within the prescribed period, the property is not subject to the automatic stay and is no longer property of the estate. An exception applies if the court (a) determines on motion of the trustee filed before the expiration of the 45-day period that the property has consequential value or would benefit the bankruptcy estate; (b) orders adequate protection of the creditor's interest; and (c) directs the debtor to deliver any collateral in the debtor's possession.

Section 304(2) amends section 722 to clarify that a chapter 7 debtor must pay the redemption value in a lump sum payment at the time of redemption.

Section 305. Relief from the automatic stay when the debtor does not complete intended surrender of consumer debt collateral

Section 305(1) amends section 362 of the Bankruptcy Code to terminate the automatic stay with respect to personal property of the estate or of the debtor in a chapter 7, 11, or 13 case that secures a claim (in whole or in part) or is subject to an unexpired lease if the debtor fails to:

(1) file timely a statement of intention as required by section 521(a)(2) of the Bankruptcy Code with respect to such property;

(2) indicate in such statement whether the property will be surrendered or retained, and if retained, whether the debtor will redeem the property or reaffirm the debt, or assume an unexpired lease, if the trustee does not; and

(3) undertake timely the actions specified in such statement of intention, unless the statement specifies reaffirmation and the creditor refuses to enter into the reaffirmation agreement on the original contract terms.

In addition to terminating the automatic stay, this provision renders such property no longer property of the estate An exception pertains where the court determines, on the motion of the trustee made prior to the expiration of the applicable time period under section 521(a)(2), and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders adequate protection of the creditor's interest, and directs the debtor to deliver any collateral in the debtor's possession.

Section 305(2) amends section 521 of the Bankruptcy Code to make the requirement to file a statement of intention applicable to all secured debts, not just secured consumer debts. In addition, it requires the debtor to effectuate his or her stated intention within 30 days from the first date set for the meeting of creditors. If the debtor fails to timely undertake certain specified actions with respect to property that a lessor or bailor owns and has leased, rented or bailed to the debtor or in which a creditor has a security interest (not otherwise avoidable under section 522(f), 544, 545, 547, 548 or 549 of the Bankruptcy Code), then nothing in the Bankruptcy Code shall prevent or limit the operation of a provision in a lease or agreement that places the debtor in default by reason of the debtor's bankruptcy or insolvency.

Section 306. Giving secured creditors fair treatment in chapter 13

Section 306(a) amends section 1325(a)(5)(B)(i) of the Bankruptcy Code to require – as a condition of confirmation – that a chapter 13 plan provide that a secured creditor retain its lien until the earlier of when the underlying debt is paid or the debtor receives a discharge. If the case is dismissed or converted prior to completion of the plan, the secured creditor is entitled to retain its lien to the extent recognized under applicable nonbankruptcy law.

Section 306(b) amends section 1325(a) of the Bankruptcy Code to provide that section 506 of the Code does not apply to a debt incurred within the 5-year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case.

Section 306(c)(1) adds to section 101 of the Bankruptcy Code a definition of the term, "debtor's principal residence," which it defines as a residential structure (including incidental property) whether or not such structure is attached to real property. The definition includes an individual condominium or cooperative unit as well as a mobile or manufactured home, and a trailer. Section 306(c)(2) defines "incidental property" as property commonly conveyed with a principal residence in the area where the residence is located. The term includes all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, and insurance proceeds. Further, the term includes all replacements and additions.

Section 307. Domiciliary requirements for exemptions

Section 307 amends 522(b)(2)(A) of the Bankruptcy Code to extend the time that a debtor must be domiciled in a state before he or she may claim that state's exemptions. If the debtor's domicile was not located in a single state for the 730-day period, then the state where the debtor was domiciled in the 180-day period preceding the 730-day period (or the longer portion of such 180-day period) controls.

Section 308. Residency requirements for homestead exemption

Section 308 amends section 522 of the Bankruptcy Code to reduce the value of a debtor's interest in the following property that may be claimed as exempt under certain circumstances: (1) real or personal property that the debtor or a dependent of the debtor uses as a residence, (2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or (3) a burial plot. Where nonexempt property is converted to the above-specified exempt property within the seven-year period preceding the filing of the bankruptcy case, the exemption must be reduced to the extent such value was acquired with the intent to hinder, delay or defraud a creditor.

Section 309. Protection secured creditors in chapter 13 cases

Section 309(a) amends section 348(f)(1) of the Bankruptcy Code to specify that valuations of property and allowed secured claims in a chapter 13 case only apply if the case is subsequently converted to one under chapter 11 or 12. If the chapter 13 case is converted to one under chapter 7, then the creditor holding security as of the petition date shall continue to be secured unless its claim was paid in full as of the conversion date. In addition, unless a prebankruptcy default has been fully cured at the time of conversion, then the default in any bankruptcy proceeding shall have the effect given under applicable nonbankruptcy law.

Section 309(b) amends section 365 of the Bankruptcy Code to provide that if a lease of personal property is rejected or not timely assumed by the trustee, the leased property is no longer property of the estate and the automatic stay under section 362 is terminated. With regard to a chapter 7 case of an individual debtor, the debtor may notify the creditor in writing of his or her desire to assume the lease. Upon being so notified, the creditor may, at its option, inform the debtor that it is willing to have the lease assumed and condition such assumption on cure of any outstanding default on terms set by the contract. If within 30 days after such notice the debtor notifies the lessor in writing that the lease is assumed, the debtor (not the bankruptcy estate) assumes the liability under the lease. Section 309(b) provides that the automatic stay of section 362 and the discharge injunction of section 524 are not violated if the creditor notifies the debtor and negotiates a cure under section 365(p)(2) (as codified by this Act).

In an individual chapter 11 or 13 case where the debtor is the lessee with respect to personal property and the lease is not assumed in the confirmed plan, the lease is deemed rejected as of the conclusion of the confirmation hearing. If the lease is rejected, the automatic stay under section 362 as well as the chapter 13 codebtor stay under section 1301 are automatically terminated with respect to such property.

Section 309(c)(1) amends section 1325(a)(5)(B) of the Bankruptcy Code to require that periodic payments pursuant to a chapter 13 plan with respect to a secured claim be made in equal monthly installments and that the amount of such payments shall not be less than the amount sufficient to provide adequate protection to the holder of such claim.

Section 309(c)(2) amends section 1326(a) of the Bankruptcy Code to require a chapter 13 debtor to commence making payments within 30 days after the filing of the plan or the order for relief, whichever is earlier. The amount of such payment must be the amount proposed in the plan, scheduled in a personal property lease for that portion of the obligation that becomes due postpetition (which amount shall reduce the payment required to be made to such lessor pursuant to the plan), and provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property (which amount shall reduce the payment required to be made to such secured creditor pursuant to the plan). Payments made pursuant to a plan must be retained by the chapter 13 trustee until confirmation or denial of confirmation. Section 309(c)(2) provides that if the plan is confirmed, the trustee must distribute payments received from the debtor as soon as practicable in accordance with the plan. If the plan is not confirmed, the trustee must return to the debtor payments not yet due and owing to creditors. Pending confirmation and subject to section 363, the court, after notice and a hearing, may modify the payments required under this provision. Section 309(c)(2) requires the debtor, within 60 days following the filing of the bankruptcy case, to provide reasonable evidence of any required insurance coverage with respect to the use or ownership of leased personal property or property securing, in whole or in part, a purchase money security interest.

Section 310. Limitation on luxury goods

Section 310 amends section 523(a)(2)(C) of the Bankruptcy Code to establish a presumption that consumer debts owed to a single creditor and aggregating more than $250 for luxury goods or services incurred by an individual debtor within 90 days before the order for relief are nondischargeable. With respect to cash advances aggregating more than $750 that are extensions of consumer credit under an open-end credit plan obtained by an individual debtor

within 70 days prepetition, section 310 establishes a presumption that these debts are nondischargeable. The term, "luxury goods or services," does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor. In addition, "an extension of consumer credit under an open-end credit plan" has the same meaning as it has under the Consumer Credit Protection Act.

Section 311. Automatic stay

Section 311 amends section 362(b) of the Bankruptcy Code to except the following proceedings from the automatic stay:

(1) the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential real property where the debtor resides as a tenant under a rental agreement;

(2) the commencement of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential real property where the debtor resides as a tenant under a rental agreement that has terminated pursuant to the lease agreement or applicable State law; and

(3) an eviction action based on endangerment to property or person, or the use of illegal drugs.

Section 311 also excepts from the automatic stay a transfer that is not avoidable under section 544 and that is not avoidable under section 549 of the Bankruptcy Code. This amendment responds to a 1997 Ninth Circuit case,[2] in which two purchase money lenders (without knowledge that the debtor had recently filed an undisclosed chapter 11 case that was later converted to chapter 7), funded the debtor's acquisition of an apartment complex and recorded their purchase-money deed of trust immediately following recordation of the deed to the debtors. Specifically, it amends the definition of "transfer" to include the "creation of a lien." This amendment gives expression to a widely held understanding that a transfer includes the creation of a lien.

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[2]Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir. 1997). The bankruptcy trustee sought to avoid the lien created by the lenders' deed of trust by asserting that the deed was an unauthorized, postpetition transfer under section 549(a) of the Bankruptcy Code. The lenders claimed that the voluntary transfer to them was a transfer of real property to good faith purchasers for value, which was thereby excepted it, under section 549(c) of the Bankruptcy Code, from avoidance. The bankruptcy court held that the postpetition recordation of the lenders' deed of trust was without authorization under the Bankruptcy Code or by the court and was therefore avoidable under section 549(a), and that the lenders did not qualify under the section 549(c) exception as good faith purchasers of real property for value. The District Court subsequently affirmed the bankruptcy court's ruling granting the trustee the authority to avoid the lenders' lien. McConville v. David Margen and Lawton Associates (*In re* McConville), No. C 94-3308, 1994 U.S. Dist. LEXIS 18095 (N.D. Cal. Dec. 14, 1994). On appeal, the lower court's decision in *McConville* was initially affirmed. Thompson v. Margen (*In re* McConville), 84 F.3d 340 (9th Cir. 1996). The Ninth Circuit, however, subsequently issued an amended opinion, also affirming the lower court, Thompson v. Margen (*In re* McConville), 97 F.3d 316 (9th Cir. 1996), and finally issued an opinion withdrawing its prior opinion and deciding the case on other grounds. It held that by obtaining secured credit from the lenders, after filing but before the appointment of a trustee, the debtors violated their fiduciary responsibility to their creditors. Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir. 1997).

Section 312. Extension of period between bankruptcy discharges

Section 312(1) amends section 727(a)(8) of the Bankruptcy Code to extend the period before which a chapter 7 debtor may receive a subsequent chapter 7 discharge from six to eight years. Section 312(2) amends section 1328 to prohibit the issuance of a discharge in a subsequent chapter 13 case if the debtor received a discharge in a prior bankruptcy case within five years preceding the filing of the subsequent chapter 13 case.

Section 313. Definition of household goods and antiques

Section 313(a) amends section 522(f) of the Bankruptcy Code to codify a modified version of the Federal Trade Commission's definition of "household goods" for purposes of the avoidance of a nonpossessory, nonpurchase money lien in such property. Section 313(b) requires the Director of the Executive Office for United States Trustees to prepare a report containing findings with respect to the use of this definition under section 522(f)(4). The report may include recommendations for amendments to section 522(f)(4).

Section 314. Debt incurred to pay nondischargeable debts

Section 314(a) amends section 523(a) of the Bankruptcy Code to make a debt incurred to pay a nondischargeable tax owed to a governmental unit (other than a tax owed to the United States) nondischargeable as well.

Section 314(b) amends section 1328(a) of the Bankruptcy Code to make the following additional debts nondischargeable in a chapter 13 case:

(1) debts for money, property, services, or extensions of credit obtained through fraud or by a false statement in writing under section 523(a)(2)(A) and (B) of the Bankruptcy Code;

(2) consumer debts owed to a single creditor that aggregate to more than $250 for luxury goods or services incurred by an individual debtor within 90 days before the filing of the bankruptcy case, and cash advances aggregating more than $750 that are extensions of consumer credit obtained by a debtor under an open-end credit plan within 70 days before the order for relief under section 523(a)(2)(C) (as amended by this Act);

(3) pursuant to section 523(a)(3) of the Bankruptcy Code, debts that require timely request for a dischargeability determination, if the creditor lacks notice or does not have actual knowledge of the case in time to make such request;

(4) debts resulting from fraud or defalcation by the debtor acting as a fiduciary under section 523(a)(4) of the Bankruptcy Code;

(5) debts for restitution or damages, awarded in a civil action against the debtor as a result of willful or malicious conduct by the debtor that caused personal injury to an individual or the death of an individual.

Section 315. Giving creditors fair notice in chapters 7 and 13 cases

Section 315(a) amends section 342 of the Bankruptcy Code in several respects. First, it deletes the provision specifying that the failure of a notice to include certain information required to be given by a debtor to a creditor does not invalidate the notice's legal effect. Second, it mandates that a debtor send any notice required under the Bankruptcy Code to the address specified by the creditor and to include on such notice the account number, if within 90 days prior to the date that the debtor filed for bankruptcy relief the creditor sent at least two

communications to the debtor specifying such account number and address. If the creditor would be in violation of applicable nonbankruptcy law by sending any such communication during this time period, then the debtor must send the notice to the address provided by the creditor stated in the last two communications containing the creditor's address and such notice shall include the current account number. Third, it permits a creditor in a chapter 7 or 13 case of an individual debtor to file with the court and serve on the debtor the address to be used to notify such creditor in that case. Five days after receipt of such notice, the court or debtor must use the address so specified for noticing such creditor. Fourth, section 315(a) specifies that if an entity files a notice with the court stating an address to be used generally in chapter 7 and chapter 13 cases, this address must be used by the court for such cases within 30 days following the filing of such notice. Fifth, it provides that any notice shall not be effective until it has been brought to the creditor's attention. If the creditor has designated an entity to be responsible for receiving notices concerning bankruptcy cases and has established reasonable procedures so that these notices will be delivered to such entity, a notice will not be deemed to have been received by the creditor until it has been received by such entity. Sixth, it prohibits the imposition of any sanction for violation of the automatic stay or for the failure to comply with the Bankruptcy Code's turnover provisions in sections 542 and 543 if a creditor has not received proper notice.

Section 315(b)(1) amends section 521 to require the debtor to file a certificate executed by the debtor's attorney or bankruptcy petition preparer stating that the attorney or preparer supplied the debtor with the notice required under section 342(b) (as amended by this Act). If the debtor is *pro se* and did not use the services of a bankruptcy petition preparer, then the debtor must sign a certificate stating that he or she obtained and read such notice. In addition, the debtor must file:

(1) copies of all payment advices or other evidence of payment from any employer within 60 days preceding the bankruptcy filing;

(2) a statement of the amount of monthly net income, itemized to show how such amount is calculated; and

(3) a statement disclosing any reasonably anticipated increase in income or expenditures in the 12-month period following the date of filing.

Upon request of a creditor, section 315(b)(2) requires the court to make the petition, schedules, and statement of financial affairs of an individual who is a chapter 7 or chapter 13 debtor available to such creditor. In addition, it requires the debtor to provide either a copy of his or her tax return or transcript (at the election of the debtor) for the latest taxable period prior to the filing of the bankruptcy case for which a tax return has been or should have been filed to the trustee not later than seven days before the date first set for the first meeting of creditors. The debtor's failure to comply requires dismissal of the case unless the debtor demonstrates that such failure was due to circumstances beyond the debtor's control. If a creditor has requested a copy of the tax return or transcript, the debtor must provide such document to the creditor at the time the debtor supplies the return or transcript to the trustee. Should the debtor fail to comply with this requirement, the case must be dismissed, unless the debtor demonstrates that such failure is due to circumstances beyond the debtor's control. A creditor in a chapter 13 case may, at any time, file a notice with the court requesting a copy of the plan. The court must supply a copy of the chapter 13 plan at a reasonable cost not later than five days after such request.

At the time filed with the taxing authority, an individual debtor in a case under chapter 7, 11 or 13 must file copies of tax returns (including any schedules or attachments) with the court at the request of any party in interest during the pendency of the case. This requirement pertains to all tax returns (including any schedules or attachments) that were not filed for the three-year

period preceding the date on which the order for relief was entered. In addition, the debtor must file copies of any amendments to such tax returns.

In a chapter 13 case, the debtor must file a statement, under penalty of perjury, of income and expenditures in the preceding tax year and monthly income showing how the amounts were calculated. The statement must be filed on the date that is the later of 90 days after the close of the debtor's tax year or one year after the order for relief, unless a plan has been confirmed. Thereafter, the statement must be filed on or before the date that is 45 days before the anniversary date of the plan's confirmation, until the case is closed. The statement must disclose the amount and sources of the debtor's income, the identity of any persons responsible with the debtor for the support of the debtor's dependents, the identity of any persons who contributed to the debtor's household expenses, and the amount of any such contributions.

Section 315(b)(2) mandates that the tax returns, amendments thereto, and the statement of income and expenditures of an individual who is a chapter 7 or chapter 13 debtor be made available to the United States trustee or bankruptcy administrator, the trustee, and any party in interest for inspection and copying, subject to procedures established by the Director of the Administrative Office for United States Courts within 180 days from the Act's enactment date. The procedures must safeguard the confidentiality of any tax information required under this provision and include restrictions on creditor access to such information. In addition, the Director must, within one year and 180 days from the Act's enactment date, prepare and submit to the Congress a report that assesses the effectiveness of such procedures and, if appropriate, includes recommendations for legislation to further protect the confidentiality of such tax information and to impose penalties for its improper use.

If requested by the United States trustee or trustee, the debtor must provide a document establishing the debtor's identity, which may include a driver's license, passport, or other document containing a photograph of the debtor, and such other personal identifying information relating to the debtor.

Section 316. Dismissal for failure to timely file schedules or provide required information

Section 316 amends section 521 of the Bankruptcy Code to provide that if an individual debtor in a voluntary chapter 7 or chapter 13 case fails to file all of the information required under section 521(a)(1) within 45 days of the date on which the case is filed, the case must be automatically dismissed, effective on the 46th day. The 45-day period may be extended for an additional 45-day period providing the debtor requests such extension prior to the expiration of the original 45-day period and the court finds justification for such extension. Upon request of a party in interest, the court must enter an order of dismissal within five days of such request.

Section 317. Adequate time to prepare for hearing on confirmation of the plan

Section 317 amends section 1324 of the Bankruptcy Code to require the chapter 13 confirmation hearing to be held not earlier than 20 days following the first date set for the meeting of creditors and not later than 45 days from this date.

Section 318. Chapter 13 plans to have a 5-year duration in certain cases

Section 318(1) amends section 1322(d) to specify that a chapter 13 plan may not provide for payments over a period that is longer than five years if the current monthly income of the debtor and the debtor's spouse (when multiplied by 12) is not less than the applicable state median family income last reported by the Census Bureau for a family of equal or lesser size. For a household of one person, the income threshold is the applicable state median family income for one earner. Section 318(1) adjusts the income threshold for households with more than four individuals. If the income of the debtor and the debtor's spouse fall below this threshold, then the duration of the plan may not be longer than three years, unless the court, for cause, approves a longer period up to five years. Section 318(2), (3), and (4) make conforming amendments to section 1325(b) and 1329(c) of the Bankruptcy Code.

Section 319. Sense of Congress regarding expansion of rule 9011 of the Federal Rules of Bankruptcy Procedure

Section 319 expresses a sense of the Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure be modified to require that all signed and unsigned documents, including schedules, supplied to the court or the trustee by a debtor be submitted only after the debtor or the debtor's attorney has made reasonable inquiry to verify that the information contained in such documents is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Section 320. Prompt relief from stay in individual cases

Section 320 amends section 362(e) of the Bankruptcy Code to terminate the automatic stay in a chapter 7, 11 or 13 case of an individual debtor within 60 days following a request for relief from the stay, unless the bankruptcy court renders a final decision prior to the expiration of the 60-day time period, such period is extended pursuant to agreement of all parties in interest, or a specific extension of time is required for good cause as described in findings made by the court.

Section 321. Chapter 11 cases filed by individuals

Section 321(a)(1) creates a new provision under chapter 11 of the Bankruptcy Code specifying that property of the estate of an individual debtor includes, in addition to that identified in section 541 of the Bankruptcy Code, all property of the kind described in section 541 that the debtor acquires after commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 12 or 13 (whichever occurs first). In addition, it includes earnings from services performed by the debtor after commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 12 or 13. Except as provided in section 1104 of the Bankruptcy Code or the order confirming a chapter 11 plan, section 321(a) provides that the debtor remains in possession of all property of the estate.

Section 321(b) amends section 1123 to require the chapter 11 plan of an individual debtor to provide for the payment to creditors of all or such portion of the debtor's earnings from personal services performed after commencement of the case or other future income that is necessary for the plan's execution.

Section 321(c) amends section 1129(a) to include an additional requirement for confirmation in a chapter 11 case of an individual debtor upon objection to confirmation by a

holder of an allowed unsecured claim. In such instance, the value of property to be distributed under the plan (1) on account of such claim, as of the plan's effective date, must not be less than the amount of such claim; or (2) is not less than the debtor's projected disposable income (as defined in section 1325(b)(2)) to be received during the five-year period beginning on the date that the first payment is due under the plan or during the plan's term, whichever is longer. Section 321(c) also amends section 1129(b)(2)(B)(ii) of the Bankruptcy Code to provide that an individual chapter 11 debtor may retain property included in the estate under section 1115 (as codified by the Act), subject to section 1129(a)(14).

Section 321(d)(1) amends section 1141(d) to provide that debts under section 523 of the Bankruptcy Code are nondischargeable in a chapter 11 case. Section 321(d)(2) provides that in the chapter 11 case of an individual debtor, the debtor is not discharged until all plan payments have been made. The court may grant a hardship discharge if the value of property actually distributed under the plan -- as of the plan's effective date -- is not less than the amount that would have been available for distribution if the case was liquidated under chapter 7 on such date, and modification of the plan is not practicable.

Section 321(e) amends section 1127 to permit a plan in a chapter 11 case of an individual debtor to be modified postconfirmation for the purpose of increasing or reducing the amount of payments, extending or reducing the time period for such payments, or altering the amount of distribution to a creditor whose claim is provided for by the plan. Such modification may be made at any time on request of the debtor, trustee, United States trustee, or holder of an allowed unsecured claim, if the plan has not been substantially consummated. The provision specifies that sections 1121 through 1129 apply to such modification. In addition, it provides that the modified plan shall become the confirmed plan only if (a) there has been disclosure pursuant to section 1125 (as the court directs); (b) notice and a hearing; and (c) such modification is approved.

Section 322. Limitation

Section 322(a) amends section 522 of the Bankruptcy Code to impose an aggregate monetary limitation of $100,000, subject to sections 544 and 548, on the value of property that the debtor may claim as exempt under state or local law pursuant to section 522(b)(3)(A) under certain circumstances. The monetary cap applies if the debtor acquired such property within the two-year period preceding the filing of the petition and the property consists of any of the following: (a) real or personal property of the debtor or that a dependent of the debtor uses as a residence; (b) an interest in a cooperative that owns property, which the debtor or the debtor's dependent uses as a residence; or (c) a burial plot for the debtor or the debtor's dependent. This limitation does not apply to a principal residence claimed as exempt by a family farmer. In addition, the limitation does not apply to any interest transferred from a debtor's principal residence (which was acquired prior to the beginning of the two-year period) to the debtor's current principal residence, if both the previous and current residences are located in the same state.

Section 322(b) makes the monetary limitation set forth in section 322(a) subject to automatic adjustment pursuant to section 104 of the Bankruptcy Code.

Section 323. Excluding employee benefit plan participant contributions and other property from the estate

Section 323(a) amends section 541(b) of the Bankruptcy Code to exclude as property of the estate funds withheld or received by an employer from its employees' wages for payment as contributions to specified employee retirement plans, deferred compensation plans, and tax-deferred annuities. Such contributions do not constitute disposable income as defined in section 1325(b)(2) of the Bankruptcy Code. Section 323(a) also excludes as property of the estate funds withheld by an employer from the wages of its employees for payment as contributions to health insurance plans regulated by state law.

Section 323(b) specifies that the amendments made by this provision do not apply to bankruptcy cases commenced prior to the expiration of the 180-day period beginning on the Act's enactment date.

Section 324. Exclusive jurisdiction in matters involving bankruptcy professionals

Section 324 amends section 1334 of title 28 of the United State Code to give a district court exclusive jurisdiction of all claims or causes of action involving the construction of section 327 of the Bankruptcy Code and rules relating to disclosure requirements under such provision.

Section 325. United States Trustee Program filing fee increase

Section 325(a) amends section 1930(a) of title 28 of the United States Code to increase the filing fees for chapter 7 and chapter 13 cases respectively to $160 and $150. Subsections 325(b) and (c) amend section 589a of title 28 of the United States Code and section 406(b) of the Judiciary Appropriations Act of 1990 to increase the percentage of the fees collected under section 1930 of title 28 of the United States Code that are paid to the United States Trustee System Fund.

Section 326. Sharing of compensation

Section 326 amends section 504 of the Bankruptcy Code to create a limited exception to the prohibition against fee sharing. The provision allows the sharing of compensation with bona fide public service attorney referral programs that operate in accordance with non-federal law regulating attorney referral services and with professional responsibility rules applicable to attorney acceptance of referrals.

Section 327. Fair valuation of collateral

Section 327 amends section 506(a) to provide that the value of an allowed claim secured by personal property that is an asset in an individual debtor's chapter 7 or chapter 13 case is determined based on the replacement value of such property as of the filing date of the bankruptcy case without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value is the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time its value is determined.

Section 328. Defaults based on nonmonetary obligations

Section 328(a)(1) amends section 365(b) to provide that a trustee does not have to cure a default that is a breach of a provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform a nonmonetary obligation under an unexpired lease of real property, if it is impossible for the trustee to cure the default by performing such nonmonetary act at and after the time of assumption. If the default arises from a failure to operate in accordance with a nonresidential real property lease, the default must be cured by performance at and after the time of assumption in accordance with the lease. Pecuniary losses resulting from such default must be compensated pursuant to section 365(b)(1). In addition, section 328(a)(1) amends section 365(b)(2)(D) to clarify that it applies to penalty provisions.

Section 328(a)(2) through (4) make technical revisions to section 365(c), (d) and (f) by deleting language that is no longer effective pursuant to the Rail Safety Enforcement and Review Act.[3]

Section 328(b) amends section 1124(2)(A) of the Bankruptcy Code to clarify that a claim is not impaired if section 365(b)(2) (as amended by this Act) expressly does not require a default with respect to such claim to be cured. In addition, it provides that any claim or interest that arises from the failure to perform a nonmonetary obligation (other than a default arising from the failure to operate a nonresidential real property lease subject to section 365(b)(1)(A)), is impaired unless the holder of such claim or interest (other than the debtor or an insider) is compensated for any actual pecuniary loss incurred by the holder as a result of such failure.

TITLE IV. GENERAL AND SMALL BUSINESS BANKRUPTCY PROVISIONS

SUBTITLE A. GENERAL BUSINESS BANKRUPTCY PROVISIONS

Section 401. Adequate protection for investors

Section 401(a) amends section 101 of the Bankruptcy Code to define "securities self regulatory organization" as a securities association or national securities exchange registered with the Securities and Exchange Commission.

Section 401(b) amends section 362 of the Bankruptcy Code to except from the automatic stay certain enforcement actions by a securities self regulatory organization.

Section 402. Meetings of creditors and equity security holders

Section 402 amends section 341 of the Bankruptcy Code to permit a court, on request of a party in interest and after notice and a hearing, to order the United States trustee to not convene a meeting of creditors or equity security holders if a chapter 11 debtor has filed a plan for which the debtor solicited acceptances prior to the commencement of the case.

Section 403. Protection of refinance of security interest

[3] Pub. L. No. 102-365.

Section 403 amends section 547(e)(2) of the Bankruptcy Code to increase the perfection period from ten to 30 days for the purpose of determining whether such transfer is an avoidable preferential transfer.

Section 404. Executory contracts and unexpired leases

Section 404(a) amends section 365(d)(4) of the Bankruptcy Code to establish more finite deadlines by which an unexpired lease of nonresidential real property must be assumed or rejected. It provides that such lease shall be deemed rejected if the trustee fails to assume it by the earlier of 120 days after the date of the order for relief or the date on which an order of confirmation is entered. The court may extend this time period for an additional 90 days on motion of the trustee or lessor for cause. If such extension is granted, the court may permit a subsequent extension only upon the lessor's written consent.

Section 404(b) amends section 365(f)(1) to make a trustee's authority to assign an executory contract or unexpired lease subject to section 365(b), amended by the Act.

Section 405. Creditors and equity security holders committees

Section 405(a) amends section 1102(a)(2) to permit, after notice and a hearing, a bankruptcy court, on its own motion or on motion of a party in interest, to order a change in a committee's membership to ensure adequate representation of parties in a case. In addition, it specifies that the court may direct the United States trustee to increase the membership of a committee for the purpose of including a small business concern if the court determines that such creditor's claim is of the kind represented by the committee and that, in the aggregate, is disproportionately large when compared to the creditor's annual gross revenue.

Section 405(b) requires the committee to allow creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments from these creditors and, pursuant to court order, make additional reports or disclosures available to them.

Section 406. Amendment to section 546 of title 11, United States Code

Section 406(1) corrects an erroneous subsection designation in section 546 of the Bankruptcy Code. Section 406(2) amends section 546 to provide that a trustee may not avoid a warehouse lien for storage, transportation, or other costs incidental to the storage and handling of goods. In addition, it specifies that this prohibition must be applied in a manner consistent with any applicable state statute that is similar to section 7-209 of the Uniform Commercial Code.

Section 407. Amendments to section 330(a) of title 11, United States Code

Section 407 amends section 330(a)(3) of the Bankruptcy Code to clarify that this provision applies to examiners, chapter 11 trustees, and professional persons. This section also amends section 330(a) to add a provision that requires a court, in determining the amount of reasonable compensation to award to a trustee, to treat such compensation as a commission pursuant to section 326 of the Bankruptcy Code.

Section 408. Postpetition disclosure and solicitation

Section 408 amends section 1125 of the Bankruptcy Code to permit an acceptance or rejection of a chapter 11 plan to be solicited from the holder of a claim or interest if the holder was solicited before the commencement of the case in a manner that complied with applicable nonbankruptcy law.

Section 409. Preferences

Section 409(1) amends section 547(c)(2) of the Bankruptcy Code to provide that a trustee may not avoid a transfer to the extent the transfer was in payment of a debt incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and the transferee and such transfer was either made (1) in the ordinary course of the debtor's financial affairs or business, *or* (2) in accordance with ordinary business terms. Present law requires the recipient of a preferential transfer to establish both of these grounds in order to sustain a defense to a preferential transfer proceeding. In a case that does not have primarily consumer debts, section 409 provides that a transfer may not be avoided if the aggregate amount of all property constituting or affected by the transfer is less than $5,000.

Section 410. Venue of certain proceedings

Section 410 amends section 1409(b) of title 28 of the United States Code to provide that a preferential transfer action in the amount of $10,000 or less must be filed in the district where the defendant resides. This amount is presently fixed at $1,000.

Section 411. Period for filing plan under chapter 11

Section 411 amends section 1121(d) of the Bankruptcy Code to mandate that a chapter 11 debtor's exclusive period for filing a plan may not be extended beyond a date that is 18 months after the order for relief. In addition, it provides that the debtor's exclusive period for obtaining acceptances of the plan may not be extended beyond 20 months after the order for relief.

Section 412. Fees arising from certain ownership interests

Section 412 amends section 523(a)(16) of the Bankruptcy Code to broaden the protections accorded to community associations with respect to fees or assessments arising from the debtor's interest in a condominium, cooperative or homeowners' association. Irrespective of whether or not the debtor physically occupies such property, any fees or assessments that accrue during the period the debtor or the trustee has a legal, equitable, or possessory ownership interest in such property are nondischargeable.

Section 413. Creditor representation at first meeting of creditors

Section 413 amends section 341(c) of the Bankruptcy Code to permit a creditor holding a consumer debt or any representative of such creditor to appear and participate at the meeting of creditors in chapter 7 and chapter 13 cases either alone or in conjunction with an attorney. In

addition, the provision clarifies that it cannot be construed to require a creditor to be represented by counsel at any meeting of creditors.

Section 414. Definition of disinterested person

Section 414 amends section 101(14) of the Bankruptcy Code to eliminate the requirement that an investment banker be a disinterested person.

Section 415. Factors for compensation of professional persons

Section 415 amends section 330(a)(3) of the Bankruptcy Code to permit the court to consider, in awarding compensation, whether the person is board certified or otherwise has demonstrated skill and experience in the practice of bankruptcy law.

Section 416. Appointment of elected trustee

Section 416 refines existing law by clarifying the procedure for the election of a private trustee in a chapter 11 case. Section 1104(b) of the Bankruptcy Code permits creditors to elect an eligible, disinterested person to serve as the trustee in the case, provided certain conditions are met. Section 416 adds a provision to section 1104(b) requiring the United States trustee to file a report certifying the election of a chapter 11 trustee. Upon the filing of the report, the elected trustee is deemed to be selected and appointed for purposes of section 1104 and the service of any prior trustee appointed in the case is terminated. Section 416 also clarifies that the court shall resolve any dispute arising out of a chapter 11 trustee election.

Section 417. Utility service

Section 417 amends section 366 of the Bankruptcy Code to provide that assurance of payment, for purposes of this provision, includes a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or other form of security that is mutually agreed upon by the debtor or trustee and the utility. It also specifies that an administrative expense priority does not constitute an assurance of payment.

With respect to chapter 11 cases, section 417 permits a utility to refuse or discontinue service if it does not receive adequate assurance of payment within 30 days of the filing of the petition that is satisfactory to the utility. The court, upon request of a party in interest, may modify the amount of this payment after notice and a hearing. In determining the adequacy of such payment, section 417 prevents a court from taking into consideration (1) the absence of security before the case was filed; (2) the debtor's timely payment of utility service charges before the case was filed; or (3) the availability of an administrative expense priority. Notwithstanding any other provision of law, section 417 permits a utility to recover or set off against a security deposit provided prepetition by the debtor to the utility without notice or court order.

Section 418. Bankruptcy fees

Section 418 amends section 1930 of title 28 of the United States Code to permit a district court or a bankruptcy court, pursuant to procedures prescribed by the Judicial Conference of the United States, to waive the chapter 7 filing fee for an individual and certain other fees under subsections (b) and (c) of section 1930 if such individual's income is less than 150 percent of the official poverty level (as defined by the Office of Management and Budget) and the individual is unable to pay such fee in installments. Section 418 also clarifies that section 1930, as amended, does not prevent a district or bankruptcy court from waiving other fees for creditors and debtors, if in accordance with Judicial Conference policy.

Section 419. More complete information regarding assets of the estate

Section 419 requires the Advisory Committee on Bankruptcy Rules, after consideration of the views of the Director of the Executive Office for United States Trustees, to propose official rules and forms directing chapter 11 debtors to disclose information concerning the value, operations, and profitability of any closely held corporation, partnership, or other entity in which the debtor holds a substantial or controlling interest. This provision is intended to ensure that the debtor's interest in any of these entities is used for the payment of allowed claims against debtor.

SUBTITLE B. SMALL BUSINESS BANKRUPTCY PROVISIONS

Section 431. Flexible rules for disclosure statement and plan

Section 431 is intended to streamline the disclosure statement process and to provide for more flexibility. Section 431(1) amends section 1125(a)(1) of the Bankruptcy Code to require a bankruptcy court, in determining whether a disclosure statement supplies adequate information, to consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing such additional information.

With regard to a small business case, section 431(2) amends section 1125(f) to provide that if the plan itself supplies adequate information, a separate disclosure statement may not be required. In addition, it provides that the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28 of the United States Code. Further, section 431(2) provides that the court may conditionally approve a disclosure statement, subject to final approval after notice and a hearing, and allow the debtor to solicit acceptances of the plan based on such disclosure statement. The hearing on the disclosure statement may be combined with the confirmation hearing.

Section 432. Definitions

Section 432 amends section 101 of the Bankruptcy Code to define a "small business case" as a chapter 11 case in which the debtor is a small business debtor. This provision, in turn, defines a "small business debtor" as a person (including affiliates that are also debtors, but excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) having noncontingent, liquidated secured and unsecured debts of less than $3 million in the aggregate (excluding debts owed to affiliates or insiders of the debtor) as of the commencement of the case. This definition applies only in a case where the United

States trustee has not appointed a creditors' committee or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor. The definition does not apply to any member of a group of affiliated debtors that has aggregate noncontingent, liquidated secured and unsecured debts in excess of $3 million (excluding debts owed to one or more affiliates or insiders).

Section 433. Standard form disclosure statement and plan

Section 433 requires the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States to propose for adoption standard form disclosure statements and plans for small business debtors. The provision directs that the forms be designed to achieve a practical balance between the needs of the court, case administrators, and other parties in interest to have reasonably complete information as well as the small business debtor's needs for economy and simplicity.

Section 434. Uniform national reporting requirements

Section 434(a) adds a new provision to the Bankruptcy Code imposing additional reporting requirements for small business debtors. It requires a small business debtor to file periodic financial reports and other documents containing the following information with respect to the debtor's business operations: (a) profitability; (b) reasonable approximations of projected cash receipts and disbursements; (c) comparisons of actual cash receipts and disbursements with projections in prior reports; (d) whether the debtor is complying with postpetition requirements pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure; and (5) whether the debtor is timely filing tax returns, paying taxes and other administrative expenses when due, and making other required government filings. In addition, the debtor must report on such other matters that are in the best interests of the debtor and the creditors and in the public interest.

If the debtor is not in compliance with any postpetition requirements pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, or is not filing tax returns, paying taxes and other administrative expenses when due, or making other required government filings, the debtor must report (a) what the failures are, (b) how they will be cured, (c) the cost of their cure, and (d) when they will be cured.

Section 434(b) specifies that the effective date of this provision is 60 days after the date on which the rules required under this provision are promulgated.

Section 435. Uniform reporting rules and forms for small business cases

Section 435(a) mandates that the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States propose official rules and forms with respect to the periodic financial reports and other information that a small business debtor must file concerning its profitability, cash receipts and disbursements, filing of its tax returns, and payment of its taxes and other administrative expenses.

Section 435(b) requires the rules and forms to achieve a practical balance between the need for reasonably complete information by the bankruptcy court, United States trustee, creditors and other parties in interest and the small business debtor's interest in having such forms be easy and inexpensive to complete. The forms should also be designed to help the small business debtor to understand its financial condition and plan its future.

Section 436. Duties in small business cases

Section 436 adds a provision to chapter 11 intended to implement greater administrative controls over such cases. The provision requires a chapter 11 trustee or debtor to:

(1) file with a voluntary petition (or in an involuntary case, within seven days from the date of the order for relief) the debtor's most recent financial statements (including a balance sheet, statement of operations, cash flow statement, and Federal income tax return) or a statement explaining why such information is not available;

(2) attend, through its senior management personnel and counsel, meetings scheduled by the bankruptcy court or the United States trustee (including the initial debtor interview and meeting of creditors pursuant to section 341 of the Bankruptcy Code), unless the court waives this requirement after notice and a hearing upon a finding of extraordinary and compelling circumstances;

(3) timely file all requisite schedules and the statement of financial affairs, unless the court, after notice and a hearing, grants an extension of up to 30 days from the order of relief, absent extraordinary and compelling circumstances;

(4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;

(5) maintain insurance that is customary and appropriate for the industry, subject to section 363(c)(2);

(6) timely file tax returns and make other required government filings;

(7) timely pay all administrative expense taxes (except for certain contested claims), subject to section 363(c)(2); and

(8) permit the United States trustee to inspect the debtor's business premises, books, and records at reasonable hours after appropriate prior written notice, unless notice is waived by the debtor.

Section 437. Plan filing and confirmation deadlines

Section 437 amends section 1121(e) of the Bankruptcy Code with respect to the period of time within which a small business debtor must file and confirm a plan of reorganization. It provides that a small business debtor's exclusive period to file a plan is 180 days from the date of the order for relief, unless the period is extended after notice and a hearing, or the court, for cause, orders otherwise. It further provides that a small business debtor must file a plan and any disclosure statement not later than 300 days after the order for relief. These time periods may be extended only if (a) the debtor, after providing notice to parties in interest, demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time; (b) a new deadline is imposed at the time the extension is granted; and (c) the order granting such extension is signed before the expiration of the existing deadline.

Section 438. Plan confirmation deadline

Section 438 amends section 1129 of the Bankruptcy Code to require that a plan in a small business case be confirmed not later than 175 days from the date of the order for relief, unless this period is extended pursuant to section 1121(e)(3) (as added by section 437 of the Act).

Section 439. Duties of the United States trustee

Section 439 amends section 586(a) of title 28 of the United States Code to require the United States trustee to perform the following additional duties with respect to small business debtors:

(1) conduct an initial debtor interview before the meeting of creditors for the purpose of (a) investigating the debtor's viability, (b) inquiring about the debtor's business plan, (c) explaining the debtor's obligation to file monthly operating reports, (d) attempting to obtain an agreed scheduling order setting various time frames (such as the date for filing a plan and effecting confirmation), and (e) informing the debtor of other obligations;

(2) if determined to be appropriate and advisable, inspect the debtor's business premises for the purpose of reviewing the debtor's books and records and verifying that the debtor has filed its tax returns;

(3) review and monitor diligently the debtor's activities to determine as promptly as possible whether the debtor will be unable to confirm a plan; and

(4) promptly apply to the court for relief in any case in which the United States trustee finds material grounds for dismissal or conversion of the case.

Section 440. Scheduling conferences

Section 440 amends section 105(d) to mandate that a bankruptcy court hold status conferences as necessary to further the expeditious and economical resolution of a bankruptcy case.

Section 441. Serial filer provisions

Section 441(1) amends section 362 of the Bankruptcy Code to provide that a court may award only actual damages for a violation of the automatic stay committed by an entity in the good faith belief that subsection (h) of section 362 (as added by this Act) applies to the debtor.

Section 441(2) adds a new subsection to section 362 of the Bankruptcy Code specifying that the automatic stay does not apply where the chapter 11 debtor:

(1) is a debtor in a small business case pending at the time the petition is filed;

(2) was a debtor in a small business case dismissed for any reason pursuant to an order that became final in the two-year period ending on the date of the order for relief entered in the pending case;

(3) was a debtor in small business case in which a plan was confirmed in the two-year period ending on the date of the order for relief entered in the pending case; or

(4) is an entity that has succeeded to substantially all of the assets or business of a small business debtor as described above.

An exception to this provision applies to a chapter 11 case that is commenced involuntarily and involves no collusion between the debtor and the petitioning creditors. Also, it does not apply if the debtor proves by a preponderance of the evidence that (a) the filing of the subsequent case resulted from circumstances beyond the debtor's control and which were not foreseeable at the time the prior case was filed; and (b) it is more likely than not that the court will confirm a feasible plan of reorganization (but not a liquidating plan) within a reasonable time.

Section 442. Expanded grounds for dismissal or conversion and appointment of trustee

Section 442(a) amends section 1112(b) of the Bankruptcy Code to mandate that the court convert or dismiss a chapter 11 case or appoint a trustee (whichever is in the best interests of creditors and the estate) if the movant establishes cause. An exception applies if (a) the debtor or a party in interest objects and establishes by a preponderance of the evidence that a plan having a reasonable possibility of being confirmed will be filed within a reasonable period of time; and (b) the grounds include an act or omission for which there exists a reasonable justification for such act or omission and that will be cured within a reasonable period of time. The court must commence the hearing on a section 1112(b) motion within 30 days of its filing and decide the motion not later than 15 days after commencement of the hearing unless the movant expressly consents to a continuance for a specified period of time or compelling circumstances prevent the court from meeting these time limits.

The term "cause" under section 1112(b), as amended by this provision, includes the following:

(1) substantial or continuing loss to or diminution of the estate;
(2) gross mismanagement of the estate;
(3) failure to maintain appropriate insurance that poses a material risk to the estate or the public;
(4) unauthorized use of cash collateral that is harmful to one or more creditors;
(5) failure to comply with a court order;
(6) repeated failure to timely satisfy any filing or reporting requirement under the Bankruptcy Code or applicable rule;
(7) failure to attend the section 341 meeting of creditors or an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure;
(8) failure to timely provide information or to attend meetings reasonably requested by the United States trustee or bankruptcy administrator;
(9) failure to timely pay postpetition taxes or file tax returns due postpetition;
(10) failure to file a disclosure statement or to confirm a plan within the time fixed by the Bankruptcy Code or pursuant to court order;
(11) failure to pay any requisite fees or charges under chapter 123 of title 28 of the United States Code;
(12) revocation of a confirmation order;
(13) inability to effectuate substantial consummation of a confirmed plan;
(14) material default by the debtor with respect to a confirmed plan;
(15) termination of a plan by reason of the occurrence of a condition specified in the plan; and
(16) the debtor's failure to pay any domestic support obligation that first becomes payable postpetition.

Section 442(a) requires the court to commence the hearing under section 1112(b) within 30 days of the filing of the motion and specifies that the court must decide the motion within 15 days after commencement of the hearing, unless the movant consents to a longer period or compelling circumstances prevent the court from meeting the specified time limits.

Section 442(b) creates additional grounds for the appointment of a chapter 11 trustee under section 1104(a). It provides that should the bankruptcy court determine cause exists to convert or dismiss a chapter 11 case, it may appoint a trustee or examiner if in the best interests of creditors and the bankruptcy estate.

Section 443. Study of operation of title 11, United States Code, with respect to small businesses

Section 443 directs the Administrator of the Small Business Administration, in consultation with the Attorney General, the Director of the Executive Office for United States Trustees, and the Director of the Administrative Office of the United States Courts, to conduct a study to determine:

(1) the internal and external factors that cause small businesses (particularly sole proprietorships) to seek bankruptcy relief and the factors that cause small businesses to successfully complete their chapter 11 cases; and

(2) how the bankruptcy laws may be made more effective and efficient in assisting small business to remain viable.

Section 444. Payment of interest

Section 444(1) amends section 362(d)(3) of the Bankruptcy Code to require a court to grant relief from the automatic stay within 30 days after it determines that a single asset real estate debtor is subject to this provision. Section 444(2) amends section 362(d)(3)(B) to specify that relief from the automatic stay shall be granted unless the single asset real estate debtor has commenced making monthly payments to each creditor secured by the debtor's real property (other than a claim secured by a judgment lien or unmatured statutory lien) in an amount equal to the interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate. It allows a debtor in its sole discretion to make the requisite interest payments out of rents or other proceeds generated by the real property.

Section 445. Priority of administrative expenses

Section 445 amends section 503(b) of the Bankruptcy Code to add a new administrative expense priority for a nonresidential real property lease that is assumed under section 365 and then subsequently rejected. The amount of the priority is the sum of all monetary obligations due under the lease (excluding penalties and obligations arising from or relating to a failure to operate) for the two-year period following the rejection date or actual turnover of the premises (whichever is later), without reduction or setoff for any reason, except for sums actually received or to be received from a nondebtor. Any remaining sums due for the balance of the term of the lease is treated as a claim under section 502(b)(6) of the Bankruptcy Code.

TITLE V. MUNICIPAL BANKRUPTCY PROVISIONS

Section 501. Petition and proceedings related to petition

Section 501 amends sections 921(d) and 301 of the Bankruptcy Code to clarify that the court must enter the order for relief in a chapter 9 case.

Section 502. Applicability of other sections to chapter 9

Section 502 amends section 901 of the Bankruptcy Code to make the following sections applicable to chapter 9 cases:

(1) section 555 (contractual right to liquidate, terminate or accelerate a securities contract);
(2) section 556 (contractual right to liquidate, terminate or accelerate a commodities or forward contract);
(3) section 559 (contractual right to liquidate, terminate or accelerate a repurchase agreement);
(4) section 560 (contractual right to liquidate, terminate or accelerate a swap agreement);
(5) section 561 (contractual right to liquidate, terminate, accelerate, or offset under a master netting agreement and across contracts); and
(6) section 562 (damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreement).

TITLE VI. BANKRUPTCY DATA

Section 601. Improved bankruptcy statistics

Section 601 amends chapter 6 of title 28 of the United States Code to require the clerk for each district to collect certain statistics for chapter 7, 11, and 13 cases in a standardized form prescribed by the Director of the Administrative Office of the United States Courts and to make this information available to the public. In addition, section 601 requires the Director to prepare an annual report and analysis for Congress concerning the information collected. The statistics must be itemized by chapter of the Bankruptcy Code and be presented in the aggregate for each district. The specific categories of information that must be gathered include the following:

(1) scheduled total assets and liabilities by category;
(2) the debtors' current monthly income, average income, and average expenses;
(3) the aggregate amount of debts discharged during the reporting period based on the difference between the total amount of scheduled debts and by categories that are predominantly nondischargeable;
(4) the average time between the filing of the bankruptcy case and the closing of the case;
(5) the number of cases in which reaffirmation agreements were filed, the total number of reaffirmation agreements filed, the number of cases in which the debtor was *pro se* and a reaffirmation agreement was filed, and the number of cases in which the reaffirmation agreement was approved by the court;
(6) for chapter 13 cases, information on the number of (a) orders determining the value of secured property in an amount less than the amount of the secured claim, (b) final orders that determined the value of property securing a claim, (c) cases dismissed, (d) cases dismissed for failure to make payments under the plan, (e) cases refiled after dismissal, (f) cases in which the plan was completed (separately itemized with respect to the number of modifications made before completion of the plan, and (g) cases in which the debtor had previously sought bankruptcy relief within the six years preceding the filing of the present case;

(7) the number of cases in which creditors were fined for misconduct and the amount of any punitive damages awarded for creditor misconduct; and
(8) the number of cases in which sanctions under rule 9011 of the Federal Rules of Bankruptcy Procedure were imposed against a debtor's counsel and the damages awarded under this rule.

Section 601 provides that the amendments in this provision take effect 18 months after the date of enactment of this Act.

Section 602. Uniform rules for the collection of bankruptcy data

Section 602 amends chapter 39 of title 28 of the United States Code to add a provision requiring the Attorney General to promulgate rules mandating the establishment of uniform forms for final reports in chapter 7, 12 and 13 cases and periodic reports in chapter 11 cases. It also specifies that these reports be designed to facilitate compilation of data and to provide maximum public access by physical inspection at one or more central filing locations and by electronic access through the Internet or other appropriate media. The information should enable an evaluation of the efficiency and practicality of the Federal bankruptcy system. In issuing rules, the Attorney General must consider (a) the reasonable needs of the public for information about the Federal bankruptcy system; (b) the economy, simplicity, and lack of undue burden on persons obligated to file the reports; and (c) appropriate privacy concerns and safeguards. Section 602 provides that final reports by trustees in chapter 7, 12, and 13 cases include the following information:

(2) the length of time the case was pending;
(3) assets abandoned;
(4) assets exempted;
(5) receipts and disbursements of the estate;
(6) administrative expenses, including those associated with section 707(b) of the Bankruptcy Code, and the actual costs of administering chapter 13 cases;
(7) claims asserted;
(8) claims allowed; and
(9) distributions to claimants and claims discharged without payment.

With regard to chapter 11 cases, section 602 provides that periodic reports include the following information regarding:

(1) the standard industry classification for businesses conducted by the debtor, as published by the Department of Commerce;
(2) the length of time that the case was pending;
(3) the number of full-time employees as of the date of the order for relief and at the end of each reporting period;
(4) cash receipts, cash disbursements, and profitability of the debtor for the most recent period and cumulatively from the date of the order for relief;
(5) the debtor's compliance with the Bankruptcy Code, including whether tax returns have been filed and taxes have been paid;
(6) professional fees approved by the court for the most recent period and cumulatively from the date of the order for relief; and
(7) plans filed and confirmed, including the aggregate recoveries of holders by class and as a percentage of total claims of an allowed class.

Section 603. Audit procedures

Section 603(a)(1) requires the Attorney General (for judicial districts served by United States trustees) and the Judicial Conference of the United States (for judicial districts served by bankruptcy administrators) to establish procedures to determine the accuracy, veracity, and completeness of petitions, schedules and other information filed by debtors pursuant to sections 111, 521 and 1322 of the Bankruptcy Code. Section 603(a)(1) requires the audits to be conducted in accordance with generally accepted auditing standards and performed by independent certified public accountants or independent licensed public accountants. It permits the Attorney General and the Judicial Conference to develop alternative auditing standards not later than two years after the date of enactment of this Act.

Section 603(a)(2) requires these procedures to:

(1) establish a method of selecting appropriate qualified contractors to perform these audits;

(2) establish a method of randomly selecting cases for audit, and that a minimum of at least one case out of every 250 cases be selected for audit;

(3) require audits in cases where the schedules of income and expenses reflect greater than average variances from the statistical norm for the district if they occur by reason of higher income or higher expenses than the statistical norm in which the schedules were filed; and

(4) require the aggregate results of such audits, including the percentage of cases by district in which a material misstatement of income or expenditures is reported, to be made available to the public on an annual basis.

Section 603(b) amends section 586 of title 28 of the United States Code to require the United States trustee to submit reports as directed by the Attorney General, including the results of audits performed under section 603(a). In addition, it authorizes the United States trustee to contract with auditors to perform the audits specified in this provision. Further, it requires the report of each audit to be filed with the court and transmitted to the United States trustee. The report must specify material misstatements of income, expenditures or assets. In a case where a material misstatement has been reported, the clerk must provide notice of such misstatement to creditors and the United States trustee must report it to the United States Attorney, if appropriate, for possible criminal prosecution. If advisable, the United States trustee must also take appropriate action, such as revoking the debtor's discharge.

Section 603(c) amends section 521 of the Bankruptcy Code to make it a duty of the debtor to cooperate with an auditor.

Section 603(d) amends section 727 of the Bankruptcy Code to add, as a ground for revocation of a chapter 7 discharge the debtor's failure to: (a) satisfactorily explain a material misstatement discovered as the result of an audit pursuant to this provision; or (b) make available for inspection all necessary documents or property belonging to the debtor that are requested in connection with such audit.

Section 603(e) provides that the amendments made by this provision take effect 18 months after the Act's enactment date.

Section 604. Sense of Congress regarding availability of bankruptcy data

Section 604 expresses a sense of Congress that it is a national policy of the United States that all data collected by bankruptcy clerks in electronic form (to the extent such data relates to public records pursuant to section 107 of the Bankruptcy Code) should be made available to the

public in a useable electronic form in bulk, subject to appropriate privacy concerns and safeguards as determined by the Judicial Conference of the United States. It also states that a uniform bankruptcy data system should be established that uses a single set of data definitions and forms to collect such data and that data for any particular bankruptcy case should be aggregated in electronic format.

TITLE VII - BANKRUPTCY TAX PROVISIONS

Section 701. Treatment of certain tax liens

Section 701(a) makes several amendments to section 724 of the Bankruptcy Code to provide greater protection for holders of *ad valorem* tax liens on real or personal property of the estate. Many school boards obtain liens on real property to ensure collection of unpaid *ad valorem* taxes. Under current law, local governments are sometimes unable to collect these taxes despite the presence of a lien because they may be subordinated to certain claims and expenses as a result of section 724. Section 701(a) is intended to protect the holders of these tax liens from, among other things, erosion of their claims' status by expenses incurred under chapter 11 of the Bankruptcy Code. Pursuant to section 701(a), subordination of *ad valorem* tax liens is still possible under section 724(b), but limited to the payment of (a) claims incurred under chapter 7 for wages, salaries, or commissions (but not expenses incurred under chapter 11); (b) claims for wages, salaries, and commissions entitled to priority under section 507(a)(4); and (c)claims for contributions to employee benefit plans entitled to priority under section 507(a)(5). Before a tax lien on real or personal property may be subordinated pursuant to section 724, the chapter 7 trustee must exhaust all other unencumbered estate assets and, consistent with section 506, recover reasonably necessary costs and expenses of preserving or disposing of such property.

Section 701(b) amends section 505(a)(2) of the Bankruptcy Code to prevent a bankruptcy court from determining the amount or legality of an *ad valorem* tax on real or personal property if the applicable period for contesting or redetermining the amount of the claim under nonbankruptcy law has expired.

Section 702. Treatment of fuel tax claims

Section 702 amends section 501 of the Bankruptcy Code to simplify the process for filing of claims by states for certain fuel taxes. Rather than requiring all states to file a claim for these taxes (as is the case under current law), section 702 permits the designated "base jurisdiction" under the International Fuel Tax Agreement to file a claim on behalf of all states, which would then be allowed as a single claim.

Section 703. Notice of request for a determination of taxes

Under current law, debtors may request that the governmental unit determine administrative tax liabilities in order to receive a discharge of those liabilities. There are no requirements as to the content or form of such notice to the government. Section 703 amends section 505(b) of the Bankruptcy Code to require bankruptcy court clerks to maintain a list of addresses designated by governmental units for service of section 505 requests. In addition, the list may also include additional information concerning filing requires so specified by such

governmental units. If a governmental entity does not designate an address and provide that address to the bankruptcy court clerk, any request made under section 505(b) of the Bankruptcy Code may be served at the address of the appropriate taxing authority of that governmental unit.

Section 704. Rate of interest on tax claims

Under current law, there is no uniform rate of interest applicable to tax claims. As a result, the bankruptcy courts have used varying standards to determine the applicable rate. Section 704 amends the Bankruptcy Code to add section 511 for the purpose of simplifying the interest rate calculation. It provides that for all tax claims (federal, state, and local), including administrative expense taxes, the interest rate shall be determined in accordance with applicable nonbankruptcy law. With respect to taxes paid under a confirmed plan, the rate of interest is determined as of the calendar month in which the plan is confirmed.

Section 705. Priority of tax claims

Under current law, a tax claim is entitled to be treated as a priority claim if it arises within certain specified time periods. In the case of income taxes, a priority arises, among other time periods, if the tax return was due within 3 years of the filing of the bankruptcy petition or if the assessment of the tax was made within 240 days of the filing of the petition. The 240-day period is tolled during the time that an offer in compromise is pending (plus 30 days). Though the statute is silent, most courts have also held that the 3-year and 240-day time periods are tolled during the pendency of a previous bankruptcy case. Section 705 amends section 507(a)(8) of the Bankruptcy Code to codify the rule tolling priority periods during the pendency of a previous bankruptcy case during that 240-day period together with an additional 90 days. It also includes tolling provisions to adjust for the collection due process rights provided by the Internal Revenue Service Restructuring and Reform Act of 1998. During any period in which the government is prohibited from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken against the debtor, the priority is tolled, plus 90 days. Also, during any time in which there was a stay of proceedings in a prior bankruptcy case or collection of an income tax was precluded by a confirmed bankruptcy plan, the priority is tolled, plus 90 days.

Section 706. Priority property taxes incurred

Under current law, many provisions of the Bankruptcy Code are keyed to the word "assessed." While this term has an accepted meaning in the federal system, it is not used in many state and local statutes and has created some confusion. To eliminate this problem with respect to real property taxes, section 706 amends section 507(a)(8)(B) of the Bankruptcy Code by replacing the word "assessed" with "incurred".

Section 707. No discharge of fraudulent taxes in chapter 13

Under current law, a debtor's ability to discharge tax debts varies depending on whether the debtor is in chapter 7 or chapter 13. Under chapter 7, taxes from a return due within 3 years of the petition date, taxes assessed within 240 days, or taxes related to an unfiled return or false return are not dischargeable. Chapter 13, on the other hand, allows these obligations to be discharged. Section 707 amends section 1328(a)(2) to prohibit the discharge of tax claims

described in section 523(a)(1)(B) and (C) as well as claims for a tax required to be collected or withheld and for which the debtor is liable in whatever capacity pursuant to section 507(a)(8)(C).

Section 708. No discharge of fraudulent taxes in chapter 11

Under current law, the confirmation of a chapter 11 plan discharges the debtor from most debts. Section 708 amends section 1141(d) of the Bankruptcy Code to except from discharge in a corporate chapter 11 case a debt described in section 523(a)(2) of the Bankruptcy Code (e.g., debts for money, property or services obtain by false pretenses, false representation or actual fraud, other than a statement respecting the debtor's or an insider's financial condition). In addition, a tax or customs duty with respect to which the debtor made a fraudulent tax return or willfully attempted in any manner to evade or defeat such tax is rendered nondischargeable in a chapter 11 case of a corporate debtor.

Section 709. Stay of tax proceedings limited to prepetition taxes

Under current law, the filing of a petition for relief under the Bankruptcy Code activates an automatic stay that enjoins the commencement or continuation of a case in the federal tax court. This rule was arguably extended in *Halpern v. Commissioner*, 96 T.C. 895 (1991), which held that the tax court did not have jurisdiction to hear a case involving a postpetition year. To address this issue, section 709 amends section 362(a)(8) of the Bankruptcy Code to specify that the automatic stay is limited to an individual debtor's prepetition taxes (taxes incurred before entering bankruptcy). The amendment clarifies that the automatic stay does not apply to an individual debtor's postpetition taxes. In addition, section 709 allows the bankruptcy court to determine whether the automatic stay applies to the postpetition tax liabilities of a corporate debtor.

Section 710. Periodic payment of taxes in chapter 11 cases

Section 710 amends section 1129(a)(9) of the Bankruptcy Code to provide that the allowed amount of priority tax claims (as of the plan's effective date) must be paid in regular cash installments within five years from the entry of the order for relief. The manner of payment may not be less favorable than that accorded the most favored nonpriority unsecured class of claims under section 1122(b).

Section 711. Avoidance of statutory liens prohibited

The Internal Revenue Code gives special protections to certain purchasers of securities and motor vehicles notwithstanding the existence of a filed tax lien. Section 711 amends section 545(2) of the Bankruptcy Code to prevent trustees from using these special protections to avoid an otherwise valid lien. Specifically, it prevents the avoidance of unperfected liens against a bona fide purchaser, if the purchaser qualifies as such under section 6323 of the Internal Revenue Code or a similar provision under state or local law.

Section 712. Payment of taxes in the conduct of business

Although current law generally requires trustees and receivers to pay taxes in the ordinary course of the debtor's business, the payment of administrative expenses must first be authorized by the court. Section 712(a) amends section 960 of title 28 of the United States Code to clarify that postpetition taxes in the ordinary course of business must be paid on or before when such tax is due under applicable nonbankruptcy law, with certain exceptions. This requirement does not apply if the obligation is a property tax secured by a lien against property that is abandoned under section 554 within a reasonable time after the lien attaches. In addition, the requirement does not pertain where the payment is excused under the Bankruptcy Code. With respect to chapter 7 cases, section 712(a) provides that the payment of a tax may be deferred until final distribution pursuant to section 726 if the tax was not incurred by a chapter 7 trustee or the court, prior to the due date of the tax, finds that the estate has insufficient funds to pay all administrative expenses in full.

Section 712(b) amends section 503(b)(1)(B)(i) of the Bankruptcy Code to clarify that this provision applies to secured as well as unsecured tax claims, including property taxes based on liability that is *in rem*, *in personam* or both.

Section 712(c) amends section 503(b)(1) to exempt a governmental unit from the requirement to file a request for payment of an administrative expense.

Section 712(d)(1) amends section 506(b) to provide that to the extent that an allowed claim is oversecured, the holder is entitled to interest and any reasonable fees, costs, or charges provided for under state law. Section 712(d)(2), in turn, amends section 506(c) to permit a trustee to recover from a secured creditor the payment of all *ad valorem* property taxes.

Section 713. Tardily filed priority tax claims

Section 713 amends section 726(a)(1) of the Bankruptcy Code to require a tax claim to be filed either before the trustee commences distribution or 10 days following the mailing to creditors of the summary of the trustee's final report, whichever is earlier, in order for the claim to be entitled to distribution as an unsecured claim.

Section 714. Income tax returns prepared by tax authorities

Section 714 amends section 523(a) of the Bankruptcy Code to provide that a return filed on behalf of a taxpayer who has provided information sufficient to complete a return constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer based on information the Secretary obtains through testimony or otherwise does not constitute filing a return (and the debt cannot be discharged).

Section 715. Discharge of the estate's liability for unpaid taxes

Under the Bankruptcy Code, a debtor may request a prompt audit to determine postpetition tax liabilities. If the government does not make a determination or request an extension of time to audit, then the debtor's determination of taxes will be final. Several court cases have held that while this protects the debtor and the trustee, it does not necessarily protect the estate. Section 715 amends section 505(b) of the Bankruptcy Code to clarify that the estate is also protected if the government does not request an audit of the debtor's tax returns. Therefore, if the government does not make a determination of the debtor's postpetition tax liabilities or request extension of time to audit, then the estate's liability for unpaid taxes is discharged.

Section 716. Requirement to file tax returns to confirm chapter 13 plans

Under current law, a debtor may enjoy the benefits of chapter 13 even if delinquent in the filing of tax returns. In response to this problem, section 716(a) amends section 1325(a) of the Bankruptcy Code to require a chapter 13 debtor file all applicable Federal, state, and local tax returns as a condition of confirmation pursuant to section 1308, as added by section 716(b).

Section 716(b) adds a new provision to chapter 13 requiring a chapter 13 debtor to be current on the filing of tax returns for the four-year period preceding the filing of the case. If the returns are not filed by the date on which the meeting of creditors is first scheduled, the trustee may hold open that meeting for a reasonable period of time to allow the debtor to file any unfiled returns. The additional period of time may not extend beyond 120 days after the date of the meeting of the creditors or beyond the date on which the return is due under the last automatic extension of time for filing. The debtor, however, may obtain an extension of time from the court if the debtor demonstrates by a preponderance of the evidence that the failure to file was attributable to circumstances beyond the debtor's control.

Section 716(c) amends section 1307 of the Bankruptcy Code to provide that if a chapter 13 debtor fails to file a tax return as required by section 1308, the court must dismiss the case or convert it to one under chapter 7 (whichever is in the best interests of creditors and the estate) on request of a party in interest or the United States trustee after notice and a hearing.

Section 716(d) amends section 502(b)(9) of the Bankruptcy Code to provide that in a chapter 13 case, a governmental unit's tax claim based on a return filed under section 1308 shall be deemed to be timely filed if the claim is filed within 60 days from the date on which such return is filed.

Section 716(e) states the sense of the Congress that the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States should propose for adoption official rules with respect an objection by a governmental unit to confirmation of a chapter 13 plan when such claim pertains to a tax return filed pursuant section 1308.

Section 717. Standards for tax disclosure

Before a chapter 11 plan may be submitted to creditors and stockholders for a vote, the plan proponent must file a disclosure statement that provides adequate information to holders of claims and interests so they can make a decision as to whether or not to vote in favor of the plan. As the tax consequences of a plan can have a significant impact on the debtor's reorganization prospects, section 717 amends section 1125(a) of the Bankruptcy Code to require that a chapter 11 disclosure statement discuss the plan's potential material Federal tax consequences to the debtor and to a hypothetical investor that is representative of the claimants and interest holders in the case.

Section 718. Setoff of tax refunds

Under current law, the filing of a bankruptcy petition automatically stays the setoff of a prepetition tax refund against a prepetition tax obligation unless the bankruptcy court approves the setoff. Interest and penalties that may continue to accrue may also be nondischargeable

pursuant to section 523(a)(1) of the Bankruptcy Code and cause individual debtors undue hardship. Section 718 amends section 362(b) of the Bankruptcy Code to create an exception to the automatic stay whereby such setoff could occur without court order unless it would not be permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of the tax liability. In that circumstance, the governmental authority may hold the refund pending resolution of the action, unless the court, on motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection pursuant to section 361.

Section 719. Special provisions related to the treatment of state and local taxes

Section 719 conforms state and local income tax administrative issues to the Internal Revenue Code. For example, under federal law, a bankruptcy petitioner filing on March 5 has two tax years -- January 1 to March 4, and March 5 to December 31. Under the Bankruptcy Code, however, state and local tax years are divided differently -- January 1 to March 5, and March 6 to December 31. Section 719 requires the states to follow the federal convention. It conforms state and local tax administration to the Internal Revenue Code in the following areas: division of tax liabilities and responsibilities between the estate and the debtor, tax consequences with respect to partnerships and transfers of property, and the taxable period of a debtor. Section 719 does not conform state and local tax rates to federal tax rates.

Section 720. Dismissal for failure to timely file tax returns

Under existing law, there is no definitive rule with respect to whether a bankruptcy court may dismiss a bankruptcy case if the debtor fails to file returns for taxes incurred postpetition. Section 720 amends section 521 of the Bankruptcy Code to allow a taxing authority to request that the court dismiss or convert a bankruptcy case if the debtor fails to file a postpetition tax return or obtain an extension. If the debtor does not file the required return or obtain the extension within 90 days from the time of the request by the taxing authority to file the return, the court must convert or dismiss the case, whichever is in the best interest of creditors and the estate.

TITLE VIII -- ANCILLARY AND OTHER CROSS-BORDER CASES

Title VIII of H.R. 833 adds a new chapter to the Bankruptcy Code for transnational bankruptcy cases. This incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases. Title VIII is intended to provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross-border insolvencies, which protects the interests of creditors and other interested parties, including the debtor. In addition, it serves to protect and maximize the value of the debtor's assets.

Section 801. Amendment to add chapter 15 to title 11, United States Code

Section 801 introduces chapter 15 to the Bankruptcy Code, which is the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on

International Trade Law ("UNCITRAL") at its Thirtieth Session on May 12-30, 1997.[4] Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.[5] If the full case is not dismissed, it will be subject to the provisions of this chapter governing cooperation, communication and coordination with the foreign courts and representatives. In any case, an order granting recognition is required as a prerequisite to the use of sections 301 and 303 by a foreign representative.

Section 1501. Purpose and scope of application

Section 1501 combines the Preamble to the Model Law (subsection (1)) with its article 1 (subsections (2) and (3))[6]. It largely follows the language of the Model Law and fills in blanks with appropriate United States references. However, it adds in subsection (3) an exclusion of certain natural persons who may be considered ordinary consumers. Although the consumer exclusion is not in the text of the Model Law, the discussions at UNCITRAL recognized that some such exclusion would be necessary in countries like the United States where there are special provisions for consumer debtors in the insolvency laws.[7]

The reference to section 109(e) essentially defines "consumer debtors" for purposes of the exclusion by incorporating the debt limitations of that section, but not its requirement of regular income. The exclusion adds a requirement that the debtor or debtor couple be citizens or long-term legal residents of the United States. This ensures that residents of other countries will not be able to manipulate this exclusion to avoid recognition of foreign proceedings in their home countries or elsewhere.

The first exclusion in subsection (c) constitutes, for the United States, the exclusion provided in article 1, subsection (2), of the Model Law.[8] Foreign representatives of foreign

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[4]The text of the Model Law and the Report of UNCITRAL on its adoption are found at U.N. G.A., 52d Sess., Supp. No. 17 (A/52/17) ("Report"). That Report and the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess. U.N. Doc. A/CN.9/442 (1997) ("Guide"), which was discussed in the negotiations leading to the Model Law and published by UNCITRAL as an aid to enacting countries, should be consulted for guidance as to the meaning and purpose of its provisions. The development of the provisions in the negotiations at UNCITRAL, in which the United States was an active participant, is recounted in the interim reports of the Working Group that are cited in the Report.

[5]*See* section 1529 and commentary.

[6]Guide at 16-19.

[7]*See id.* at 18, ¶60; 19 ¶66.

[8]*Id.* at 17.

proceedings which are excluded from the scope of chapter 15 may seek comity from courts other than the bankruptcy court since the limitations of section 1509(b)(2) and (3) would not apply to them.

The reference to section 109(b) interpolates into chapter 15 the entities governed by specialized insolvency regimes under United States law which are currently excluded from liquidation proceedings under title 11. Section 1501 contains an exception to the section 109(b) exclusions so that foreign proceedings of foreign insurance companies are eligible for recognition and relief under chapter 15 as they had been under section 304. However, section 1501(d) has the effect of leaving to State regulation any deposit, escrow, trust fund or the like posted by a foreign insurer under State law.

Section 1502. Definitions

"Debtor" is given a special definition for this chapter. That definition does not come from the Model Law but is necessary to eliminate the need to refer repeatedly to "the same debtor as in the foreign proceeding." With certain exceptions, the term "person" used in the Model Law has been replaced with "entity," which is defined broadly in section 101(15) to include natural persons and various legal entities, thus matching the intended breadth of the term "person" in the Model Law. The exceptions include contexts in which a natural person is intended and those in which the Model Law language already refers to both persons and entities other than persons. The definition of "trustee" for this chapter ensures that debtors in possession and debtors, as well as trustees, are included in the term.[9]

The definition of "within the territorial jurisdiction of the United States" in subsection (7) is not taken from the Model Law. It has been added because the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances. Thus a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state. In addition, a definition of "recognition" supplements the Model Law definitions and merely simplifies drafting of various other sections of chapter 15.

Two key definitions of "foreign proceeding" and "foreign representative," are found in sections 101(23) and (24), which have been amended consistent with Model Law article 2.[10] The definitions of "establishment," "foreign court," "foreign main proceeding," and "foreign non-main proceeding" have been taken from Model Law article 2, with only minor language variations necessary to comport with United States terminology. Additionally, defined terms have been placed in alphabetical order.[11] In order to be recognized as a foreign non-main proceeding, the debtor must at least have an establishment in that foreign country.[12]

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[9] *See* section 1505.

[10] Guide at 19-21, ¶¶67-68.

[11] *See* Guide at 19, (Model Law) 21 ¶75 (concerning establishment); 21 ¶74 (concerning foreign court); 21 ¶¶72, 73 and 75 (concerning foreign main and non-main proceedings).

[12] *See id.* at 21, ¶75.

Section 1503. International obligations of the United States

This section is taken exactly from the Model Law with only minor adaptations of terminology.[13] Although this section makes an international obligation prevail over chapter 15, the courts will attempt to read the Model Law and the international obligation so as not to conflict, especially if the international obligation addresses a subject matter less directly related than the Model Law to a case before the court.

Section 1504. Commencement of ancillary case

Article 4 of the Model Law is designed for designation of the competent court which will exercise jurisdiction under the Model Law. In United States law, section 1334(a) of title 28 gives exclusive jurisdiction to the district courts in a "case" under this title.[14] Therefore, since the competent court has been determined in title 28, this section instead provides that a petition for recognition commences a "case," an approach that also invokes a number of other useful procedural provisions. In addition, a new subsection (P) to section 157 of title 28 makes cases under this chapter part of the core jurisdiction of bankruptcy courts when referred to them by the district courts, thus completing the designation of the competent court. Finally, the particular bankruptcy court that will rule on the petition is determined pursuant to a revised section 1410 of title 28 governing venue and transfer.[15]

The title "ancillary" in this section and in the title of this chapter emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in

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[13] *See id.* at 22, Art. 3.

[14] *See id.* at 23, Art. 4.

[15] New section 1410 of title 28 provides as follows:

> A case under chapter 15 of title 11 may be commenced in the district court for the district --
>
> (1) in which the debtor has its principal place of business or principal assets in the United States;
>
> (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding or enforcement of judgment in a Federal or State court; or
>
> (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties having regard to the relief sought by the foreign representative.

aid of the main proceedings, in preference to a system of full bankruptcies (often called "secondary" proceedings) in each state where assets are found. Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529). In the United States, the court will have the power to suspend or dismiss such cases where appropriate under section 305.

Section 1505. Authorization to act in a foreign country

The language in this section varies from the wording of article 5 of the Model Law as necessary to comport with United States law and terminology. The slight alteration to the language in the last sentence is meant to emphasize that the identification of the trustee or other entity entitled to act is under United States law, while the scope of actions that may be taken by the trustee or other entity under foreign law is limited by the foreign law.[16]

The related amendment to section 586(a)(3) of title 28 makes acting pursuant to authorization under this section an additional power of a trustee or debtor in possession. While the Model Law automatically authorizes an administrator to act abroad, this section requires all trustees and debtors to obtain court approval before acting abroad. That requirement is a change from the language of the Model Law, but one that is purely internal to United States law.[17] Its main purpose is to ensure that the court has knowledge and control of possibly expensive activities, but it will have the collateral benefit of providing further assurance to foreign courts that the United States debtor or representative is under judicial authority and supervision. This requirement means that the first-day orders in reorganization cases should include authorization to act under this section where appropriate.

This section also contemplates the designation of an examiner or other natural person to act for the estate in one or more foreign countries where appropriate. One instance might be a case in which the designated person had a special expertise relevant to that assignment. Another might be where the foreign court would be more comfortable with a designated person than with an entity like a debtor in possession. Either are to be recognized under the Model Law.[18]

Section 1506. Public policy exception

This provision follows the Model Law article 5 exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word "manifestly" in international usage restricts the public policy exception to the most fundamental policies of the United States.[19]

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[16] *See* Guide at 24.

[17] *See id.* at 24, Art. 5.

[18] *See id.* at 23-24, ¶82.

[19] *See id.* at 25.

Section 1507. Additional assistance

Subsection (1) follows the language of Model Law article 7.[20] Subsection (2) makes the authority for additional relief (beyond that permitted under sections 1519-1521, below) subject to the conditions for relief heretofore specified in United States law under section 304, which is repealed. This section is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter. The additional assistance is made conditional upon the court's consideration of the factors set forth in the current subsection 304(c) in a context of a reasonable balancing of interests following current case law. The references to "estate" in section 304 have been changed to refer to the debtor's property, because many foreign systems do not create an estate in insolvency proceedings of the sort recognized under this chapter. Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.[21]

Section 1508. Interpretation

This provision follows conceptually Model Law article 8 and is a standard one in recent UNCITRAL treaties and model laws. Language changes were made to express the concepts more clearly in United States vernacular.[22] Interpretation of this chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well. Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law On Uniform Texts, which is a service of UNCITRAL. CLOUT receives reports from national reporters all over the world concerning court decisions interpreting treaties, model laws, and other text promulgated by UNCITRAL. Not only are these sources persuasive, but they are important to the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.

Section 1509. Right of direct access

This section implements the purpose of article 9 of the Model Law, enabling a foreign representative to commence a case under this chapter by filing a petition directly with the court without preliminary formalities that may delay or prevent relief. It varies the language to fit United States procedural requirements and it imposes recognition of the foreign proceeding as a

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[20] *Id.* at 26.

[21] *Id.*

[22] *Id.* at 26, ¶91.

condition to further rights and duties of the foreign representative. If recognition is granted, the foreign representative will have full capacity under United States law (subsection (b)(1)), may request such relief in a state or federal court other than the bankruptcy court (subsection (b)(2)), and may be granted comity or cooperation by such non-bankruptcy court (subsection (b)(3) and (c)). Subsections (b)(2), (b)(3), and (c) make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property. This section, therefore, completes for the United States the work of article 4 of the Model Law ("competent court") as well as article 9.[23]

Although a petition under current section 304 is the proper method for achieving deference by a United States court to a foreign insolvency under present law, some cases in state and federal courts under current law have granted comity suspension or dismissal of cases involving foreign proceedings without requiring a section 304 petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because there is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under this chapter. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.[24]

Subsection (d) has been added to ensure that a foreign representative cannot seek relief in courts in the United States after being denied recognition by the court under this chapter. Subsection (e) makes activities in the United States by a foreign representative subject to applicable United States law, just as 28 U.S.C. section 959 does for a domestic trustee in bankruptcy.[25] Subsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for example an account receivable, by a foreign representative may proceed without commencement of a case or recognition under this chapter.

Section 1510. Limited jurisdiction

Section 1510, article 10 of the Model Law, is modeled on section 306 of the Bankruptcy Code. Although the language referring to conditional relief in section 306 is not included, the court has the power under section 1522 to attach appropriate conditions to any relief it may grant. Nevertheless, the authority in section 1522 is not intended to permit the imposition of

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[23]*See id.* at 23, Art. 4, ¶¶79-83; 27 Art. 9, ¶93.

[24]*See id.* at 27, Art. 9; 34-35, Art. 15 and ¶¶116-119; 39-40, Art. 18, ¶¶133-134; *see also* sections 1515(3), 1518.

[25]*Id.* at 27, ¶93.

jurisdiction over the foreign representative beyond the boundaries of the case under this chapter and any related actions the foreign representative may take, such as commencing a case under another chapter of this title.

Section 1511. Commencement of case under section 301 or 303

This section follows the intent of article 11 of the Model Law, but adds language that conforms to United States law or that is otherwise necessary in the United States given its many bankruptcy court districts and the importance of full information and coordination among them.[26] Article 11 does not distinguish between voluntary and involuntary proceedings, but seems to have implicitly assumed an involuntary proceeding.[27] Subsection 1(a)(2) goes farther and permits a voluntary filing, with its much simpler requirements, if the foreign proceeding that has been recognized is a main proceeding.

Section 1512. Participation of a foreign representative in a case under this title

This section follows article 12 of the Model Law with a slight alteration to tie into United States procedural terminology.[28] The effect of this section is to make the recognized foreign representative a party in interest in any pending or later commenced United States bankruptcy case.[29] Throughout this chapter, the word "case" has been substituted for the word "proceeding" in the Model Law when referring to cases under the United States Bankruptcy Code, to conform to United States usage.

Section 1513. Access of foreign creditors to a case under this title

This section mandates nondiscriminatory or "national" treatment for foreign creditors, except as provided in subsection (b) and section 1514. It follows the intent of Model Law article 13, but the language required alteration to fit into the Bankruptcy Code.[30] The law as to priority for foreign claims that fit within a class given priority treatment under section 507 (for example, foreign employees or spouses) is unsettled. This section permits the continued development of case law on that subject and its general principle of national treatment should be an important factor to be considered. At a minimum, under this section, foreign claims must receive the treatment given to general unsecured claims without priority, unless they are in a

[26] *See id.* at 28, Art. 11.

[27] *Id.* at 38, ¶¶97-99.

[28] *Id.* at 29, Art. 12.

[29] *Id*. at 29, ¶¶10-102.

[30] *Id*. at 30, ¶103.

class of claims in which domestic creditors would also be subordinated.[31] The Model Law allows for an exception to the policy of nondiscrimination as to foreign revenue and other public law claims.[32] Such claims (such as tax and social security claims) have been denied enforcement in the United States traditionally, inside and outside of bankruptcy. The Bankruptcy Code is silent on this point, so the rule is purely a matter of traditional case law. It is not clear if this policy should be maintained or modified, so this section leaves it to developing case law. It also allows the Department of the Treasury to negotiate reciprocal arrangements with our tax treaty partners in this regard, although it does not mandate any restriction of the evolution of case law pending such negotiations.

Section 1514. Notification of foreign creditors concerning a case under title 11

This section ensures that foreign creditors receive proper notice of cases in the United States.[33] As a "foreign creditor" is not a defined term, foreign addresses are used as the distinguishing factor. The Federal Rules of Bankruptcy Procedure ("Rules") should be amended to conform to the requirements of this section, including a special form for initial notice to such creditors. In particular, the Rules must provide for additional time for such creditors to file proofs of claim where appropriate and must provide for the court to make specific orders in that regard in proper circumstances. The notice must specify that secured claims must be asserted, because in many countries such claims are not affected by an insolvency proceeding and need not be filed.[34] Of course, if a foreign creditor has made an appropriate request for notice, it will receive notices in every instance where notices would be sent to other creditors who have made such requests. Subsection (d) replaces the reference to "a reasonable time period" in Model Law article 14(3)(a).[35] It makes clear that the Rules, local rules, and court orders must make appropriate adjustments in time periods and bar dates so that foreign creditors have a reasonable time within which to receive notice or take an action.

Section 1515. Application for recognition of a foreign proceeding

This section follows article 15 of the Model Law with minor changes.[36] The Rules will require amendment to provide forms for some or all of the documents mentioned in this section, to make necessary additions to Rules 1000 and 2002 to facilitate appropriate notices of the

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[31] *See id.* at 30, ¶104.

[32] *See id.* at 31, ¶105.

[33] *See* Model Law, Art. 14; Guide at 31-32, ¶¶106-109.

[34] Guide at 33, ¶111.

[35] *Id.* at 31, Art. 14(3)(a).

[36] *Id.* at 33.

hearing on the petition for recognition, and to require filing of lists of creditors and other interested persons who should receive notices. Throughout the Model Law, the question of notice procedure is left to the law of the enacting state.[37]

Section 1516. Presumptions concerning recognition

This section follows article 16 of the Model Law with minor changes.[38] Although sections 1515 and 1516 are designed to make recognition as simple and expedient as possible, the court may hear proof on any element stated. The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. The word "proof" in subsection (3) has been changed to "evidence" to make it clearer using United States terminology that the ultimate burden is on the foreign representative.[39] "Registered office" is the term used in the Model Law to refer to the place of incorporation or the equivalent for an entity that is not a natural person.[40] The presumption that the place of the registered office is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy.

Section 1517. Order granting recognition

This section closely follows article 17 of the Model Law, with a few exceptions.[41] The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code. The requirements of this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition. Reciprocity was specifically suggested as a requirement for recognition on more than one occasion in the negotiations that resulted in the Model Law. It was rejected by overwhelming consensus each time. The United States was one of the leading countries opposing the inclusion of a reciprocity requirement.[42] In this regard, the Model Law conforms to section 304, which has no such requirement.

The drafters of the Model Law understood that only a main proceeding or a non-main proceeding meeting the standards of section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition under this section. The Model Law has been slightly

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[37] *See id.* at 36, ¶121.

[38] *Id.* at 36

[39] *Id.* at 36, Art. 16(3).

[40] *Id.*

[41] *Id.* at 37.

[42] Report of the working group on Insolvency Law on the work of its Twentieth Session (Vienna, 7-18 October 1996), at 6, ¶¶16-20.

modified to make this point clear by referring to the section 1502 definition of main and non-main proceedings, as well as to the general definition of a foreign proceeding in section 101(23). Naturally, a petition under section 1515 must show that proceeding is a main or a qualifying non-main proceeding in order to win recognition under this section.

Consistent with the position of various civil law representatives in the drafting of the Model Law, recognition creates a status with the effects set forth in section 1520, so those effects are not viewed as orders to be modified, as are orders granting relief under sections 1519 and 1521. Subsection (4) states the grounds for modifying or terminating recognition. On the other hand, the effects of recognition (found in section 1520 and including an automatic stay) are subject to modification under section 362(d), made applicable by section 1520(2), which permits relief from the automatic stay of section 1520 for cause.

Paragraph 1(d) of section 17 of the Model Law has been omitted as an unnecessary requirement for United States purposes, because a petition submitted to the wrong court will be dismissed or transferred under other provisions of United States law.[43] The reference to section 350 refers to the routine closing of a case that has been completed and will invoke requirements including a final report from the foreign representative in such form as the Rules may provide or a court may order.[44]

Section 1518. Subsequent information

This section follows the Model Law, except to eliminate the word "same" which is rendered unnecessary by the definition of "debtor" in section 1502 and to provide for a formal document to be filed with the court.[45] Judges in several jurisdictions, including the United States, have reported a need for a requirement of complete and candid reports to the court of all proceedings, worldwide, involving the debtor. This section will ensure that such information is provided to the court on a timely basis. Any failure to comply with this section will be subject to the sanctions available to the court for violations of the statute. The section leaves to the Rules the form of the required notice and related questions of notice to parties in interest, the time for filing, and the like.

[43]Guide at 37, Art. 17(1)(d).

[44]*Id.*

[45]*Id.* at 39-40, ¶¶133, 134.

Section 1519. Relief may be granted upon petition for recognition of a foreign proceeding

This section generally follows article 19 of the Model Law.[46] The bankruptcy court will have jurisdiction to grant emergency relief under Rule 7065 pending a hearing on the petition for recognition. This section does not expand or reduce the scope of section 105 as determined by cases under section 105 nor does it modify the sweep of sections 555 to 560. Subsection (d) precludes injunctive relief against police and regulatory action under section 1519, leaving section 105 as the only avenue to such relief. Subsection (e) makes clear that this section contemplates injunctive relief and that such relief is subject to specific rules and a body of jurisprudence. Subsection (f) was added to complement amendments to the Bankruptcy Code provisions dealing with financial contracts.

Section 1520. Effects of recognition of a foreign main proceeding

In general, this chapter sets forth all the relief that is available as a matter of right based upon recognition hereunder, although additional assistance may be provided under section 1507 and this chapter have no effect on any relief currently available under section 105. The stay created by article 20 of the Model Law is imported to chapter 15 from existing provisions of the Code. Subsection (a)(1) combines subsections 1(a) and (b) of article 20 of the Model Law, because section 362 imposes the restrictions required by those two subsections and additional restrictions as well.[47]

Subsections (a)(2) and (4) apply the Bankruptcy Code sections that impose the restrictions called for by subsection 1(c) of the Model Law. In both cases, the provisions are broader and more complete than those contemplated by the Model Law, but include all the restraints the Model Law provisions would impose.[48] As the foreign proceeding may or may not create an "estate" similar to that created in cases under this title, the restraints are applicable to actions against the debtor under section 362(a) and with respect to the property of the debtor under the remaining sections. The only property covered by this section is property within the territorial jurisdiction of the United States as defined in section 1502. To achieve effects on property of the debtor which is not within the territorial jurisdiction of the United States, the foreign representative would have to commence a case under another chapter of this title.

By applying sections 361 and 362, subsection (a) makes applicable the United States exceptions and limitations to the restraints imposed on creditors, debtors, and other in a case under this title, as stated in article 20(2) of the Model Law.[49] It also introduces the concept of

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[46] *Id.* at 40.

[47] *Id.* at 42, Art. 20 1(a), (b).

[48] *Id.* at 42, 45.

[49] *Id.* at 42, Art. 20(2); 44, ¶¶ 148, 150.

adequate protection provided in sections 362 and 363. These exceptions and limitations include those set forth in sections 362(b), (c) and (d). As one result, the court has the power to terminate the stay pursuant to section 362(d), for cause, including a failure of adequate protection.[50]

Subsection (a)(2), by its reference to sections 363 and 552 adds to the powers of a foreign representative of a foreign main proceeding an automatic right to operate the debtor's business and exercise the power of a trustee under sections 363 and 542, unless the court orders otherwise. A foreign representative of a foreign main proceeding may need to continue a business operation to maintain value and granting that authority automatically will eliminate the risk of delay. If the court is uncomfortable about this authority in a particular situation it can "order otherwise" as part of the order granting recognition.

Two special exceptions to the automatic stay are embodied in subsections (b) and (c). To preserve a claim in certain foreign countries, it may be necessary to commence an action. Subsection (b) permits the commencement of such an action, but would not allow for its further prosecution. Subsection (c) provides that there is no stay of the commencement of a full United States bankruptcy case. This essentially provides an escape hatch through which any entity, including the foreign representative, can flee into a full case. The full case, however, will remain subject to subchapters IV and V on cooperation and coordination of proceedings and to section 305 providing for stay or dismissal. Section 108 of the Bankruptcy Code provides the tolling protection intended by Model Law article 20(3), so no exception is necessary as to claims that might be extinguished under United States law.[51]

Section 1521. Relief that may be granted upon recognition of a foreign proceeding

[50] *Id.* at 42, Art. 20(3); 44-45, ¶¶ 151 152.

[51] *Id.*

This section follows article 21 of the Model Law, with detailed changes to fit United States law.[52] The exceptions in subsection (a)(7) relate to avoiding powers. The foreign representative's status as to such powers is governed by section 1523 below. The avoiding power in section 549 and the exceptions to that power are covered by section 1520(a)(2). The word "adequately" in the Model Law, articles 21(2) and 22(1), has been changed to "sufficiently" in sections 1521(b) and 1522(a) to avoid confusion with a very specialized legal term in United States bankruptcy, "adequate protection."[53] Subsection (c) is designed to limit relief to assets having some direct connection with a non-main proceeding, for example where they were part of an operating division in the jurisdiction of the non-main proceeding when they were fraudulently conveyed and then brought to the United States.[54] Subsections (d), (e) and (f) are identical to those same subsections of section 1519. This section does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304 nor does it modify the sweep of sections 555 through 560.

Section 1522. Protection of creditors and other interested persons

This section follows article 22 of the Model Law with changes for United States usage and references to relevant Bankruptcy Code sections.[55] It gives the bankruptcy court broad latitude to mold relief to circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors. For response to a showing that the conditions necessary to recognition did not actually exist or have ceased to exist, see section 1517. Concerning the change of "adequately" in the Model Law to "sufficiently" in this section, see section 1521. Subsection (d) is new and simply makes clear that an examiner appointed in a case under chapter 15 shall be subject to certain duties and bonding requirements based on those imposed on trustees and examiners under other chapters of this title.

Section 1523. Actions to avoid acts detrimental to creditors

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[52] *Id.* at 45-46, Art. 21.

[53] *Id.* at 46, Art. 21(2); 47, Art. 22(1).

[54] *See id.* at 46-47, ¶¶ 158, 160.

[55] *Id.* at 47.

This section follows article 23 of the Model Law, with wording to fit it within procedure under this title.[56] It confers standing on a recognized foreign representative to assert an avoidance action but only in a pending case under another chapter of this title. The Model Law is not clear about whether it would grant standing in a recognized foreign proceeding if no full case were pending. This limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation.[57] The courts will determine the nature and extent of any such action and what national law may be applicable to such action.

Section 1524. Intervention by a foreign representative

The wording is the same as the Model Law, except for a few clarifying words.[58] This section gives the foreign representative whose foreign proceeding has been recognized the right to intervene in United States cases, state or federal, where the debtor is a party. Recognition being an act under federal bankruptcy law, it must take effect in state as well as federal courts. This section does not require substituting the foreign representative for the debtor, although that result may be appropriate in some circumstances.

Section 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives

The wording is almost exactly that of the Model Law.[59] The right of courts to communicate with other courts in worldwide insolvency cases is of central importance. This section authorizes courts to do so. This right must be exercised, however, with due regard to the rights of the parties. Guidelines for such communications are left to the federal rules of bankruptcy procedure.

[56] *Id.* at 48-49.

[57] *See id.* at 49, ¶166.

[58] *Id.* at 49.

[59] *Id.* at 50.

Section 1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives

This section follows the Model Law almost exactly.[60] The language in Model Law article 26 concerning the trustee's function was eliminated as unnecessary because always implied under United States law. The section authorizes the trustee, including a debtor in possession, to cooperate with other proceedings. Subsection (3) is not taken from the Model Law but is added so that any examiner appointed under this chapter will be designated by the United States trustee and will be bonded.

Section 1527. Forms of cooperation

This section follows the Model Law exactly.[61] United States bankruptcy courts have already engaged in most of the forms of cooperation mentioned here, but they now have explicit statutory authorization for acts like the approval of protocols of the sort used in cases.[62]

Section 1528. Commencement of a case under title 11 after recognition of a foreign main proceeding

This section follows the Model Law, with specifics of United States law replacing the general clause at the end to cover assets normally included within the jurisdiction of the United States courts in bankruptcy cases, except where assets are subject to the jurisdiction of another recognized proceeding.[63] In a full bankruptcy case, the United States bankruptcy court generally has jurisdiction over assets outside the United States. Here that jurisdiction is limited where those assets are controlled by another recognized proceeding, if it is a main proceeding.

The court may use section 305 of this title to dismiss, stay, or limit a case as necessary to promote cooperation and coordination in a cross-border case. In addition, although the jurisdictional limitation applies only to United States bankruptcy cases commenced after recognition of a foreign proceeding, the court has ample authority under the next section and section 305 to exercise its discretion to dismiss, stay, or limit a United States case filed after a petition for recognition of a foreign main proceeding has been filed but before it has been approved, if recognition is ultimately granted.

Section 1529. Coordination of a case under title 11 and a foreign proceeding

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[60] *Id.* at 51.

[61] Guide at 51, 53.

[62] *See e.g.*, Gitlin v. Societe Generale, Barclays Bank (*In re* Maxwell Communication Corp.), 93 F.2d 1036 (2d Cir. 1996).

[63] Guide at 54-55.

This section follows the Model Law almost exactly, but subsection (4) adds a reference to section 305 to make it clear the bankruptcy court may continue to use that section, as under present law, to dismiss or suspend a United States case as part of coordination and cooperation with foreign proceedings.[64] This provision is consistent with United States policy to act ancillary to a foreign main proceeding whenever possible.

Section 1530. Coordination of more than one foreign proceeding

This section follows exactly article 30 of the Model Law.[65] It ensures that a foreign main proceeding will be given primacy in the United States, consistent with the overall approach of the United States favoring assistance to foreign main proceedings.

Section 1531. Presumption of insolvency based on recognition of a foreign main proceeding

This section follows the Model Law exactly, inserting a reference to the standard for an involuntary case under this title.[66] Where an insolvency proceeding has begun in the home country of the debtor, and in the absence of contrary evidence, the foreign representative should not have to make a new showing that the debtor is in the sort of financial distress requiring a collective judicial remedy. The word "proof" here means "presumption." The presumption does not arise for any purpose outside this section.

Section 1532. Rule of payment in concurrent proceeding

This section follows the Model Law exactly and is very similar to prior section 508(a), which is repealed. The Model Law language is somewhat clearer and broader than the equivalent language of prior section 508(a).[67]

Section 802. Other amendments to titles 11 and 28, United States Code

Section 802(a) amends section 103 of the Bankruptcy Code to clarify the provisions of the Code that apply to chapter 15 and to specify which portions of chapter 15 apply in cases under other chapters of title 11. Section 802(b) amends the Bankruptcy Code's definitions of foreign proceeding and foreign representative in section 101. The new definitions are nearly identical to those contained in the Model Law but add to the phrase "under a law relating to

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[64] *Id.* at 55-56.

[65] *Id.* at 57.

[66] *Id.* at 58.

[67] *Id.* at 59.

insolvency" the words "or debt adjustment." This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24).[68]

Section 802(c) amends section 157(b)(2) of title 28 to provide that proceedings under chapter 15 will be core proceedings while other amendments to title 28 provide that the United States trustee's standing extends to cases under chapter 15 and that the United States trustee's duties include acting in chapter 15 cases. Although the United States will continue to assert worldwide jurisdiction over property of a domestic or foreign debtor in a full bankruptcy case under chapters 7 and 13 of this title, subject to deference to foreign proceedings under chapter 15 and section 305, the situation is different in a case commenced under chapter 15. There the United States is acting solely in an ancillary position, so jurisdiction over property is limited to that stated in chapter 15.

Section 802(d) amends section 109 of the Bankruptcy Code to permit recognition of foreign proceedings involving foreign insurance companies and involving foreign banks which do not have a branch or agency in the United States (as defined in 12 U.S.C. 3101). While a foreign bank not subject to United States regulation will be eligible for chapter 15 as a consequence of the amendment to section 109, section 303 prohibits the commencement of a full involuntary case against such a foreign bank unless the bank is a debtor in a foreign proceeding.

While section 304 is repealed and replaced by chapter 15, access to the jurisprudence which developed under section 304 is preserved in the context of new section 1507. On deciding whether to grant the Additional Assistance contemplated by section 1507, the court must consider the same factors that had been imposed by former section 304. The venue provisions for cases ancillary to foreign proceedings have been amended to provide a hierarchy of choices beginning with principal place of business in the United States, if any. If there is no principal place of business in the United States, but there is litigation against a debtor, then the district in which the litigation is pending would be the appropriate venue. In any other case, venue must be determined with reference to the interests of justice and the convenience of the parties.

TITLE IX -- FINANCIAL CONTRACT PROVISIONS[69]

Section 901. Treatment of certain agreements by conservators or receivers of insured depository institutions

Subsections (a) through (f) amend the Federal Deposit Insurance Act's (FDIA) definitions of Aqualified financial contract"(QFC), Asecurities contract," Acommodity contract,@

[68] *Id.* at 51-52, 71.

[69] Title IX is substantively very similar to H.R. 1161, the Financial Contract Netting Improvement Act of 1999, a bill that was introduced in the 106th Congress. Accordingly, the text explaining title IX is derived from the report accompanying this bill. *See* H.R. REP. NO. 106-834, Pt.1 (2000).

Aforward contract,@ Arepurchase agreement@ and Aswap agreement@ to make them consistent with the definitions in the Bankruptcy Code, as amended by this Act.

Subsection (b) amends the definition of Asecurities contract@ to encompass options on securities and margin loans. The inclusion of Amargin loans@ in the definition is intended to encompass only those loans commonly known in the securities industry as Amargin loans@ and does not include other loans utilizing securities as collateral, however documented. Subsection (b) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute Asecurities contracts.@ While a contract for the purchase or sale or a participation may constitute a Asecurities contract,@ the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a Asecurities contract.@

Subsection (e) amends the definition of a "repurchase agreement" to codify the substance of the Federal Deposit Insurance Corporation's (FDIC) 1995 regulation defining repurchase agreement to include those on qualified foreign government securities.[70] The term "qualified foreign government securities" is defined to include those that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). Subsection (e) reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. Any risk presented by this modification is addressed by limiting it to those issued or guaranteed by OECD member states. Subsection (e), like subsection (b) for "securities contracts," specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer would constitute a "repurchase agreement."

Subsection (f) amends the definition of "swap agreement" to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, spread, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or a weather option." This amendment would achieve contractual netting across economically similar over-the-counter products that can be terminated and closed out on a mark-to-market basis.

Traditional commercial and lending arrangements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under either the FDIA or the Bankruptcy Code because the parties purport to document or label

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[70] *See* 12 C.F.R. ' 360.5.

the transactions as "swap agreements." In addition, these definitions apply only for purposes of the FDIA and the Bankruptcy Code. These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to effect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

Subsection (g) amends the FDIA by adding a definition for "transfer," which is a key term used in the FDIA, to ensure that it is broadly construed to encompass dispositions of property or interests in property. The definition tracks that in section 101 of the Bankruptcy Code.

Subsection (h) makes clarifying technical changes to conform the receivership and conservatorship provisions of the FDIA. This subsection (h) also clarifies that the FDIA expressly protects rights under security agreements, arrangements or other credit enhancement related to one or more qualified financial contracts (QFCs). An example of a security arrangement is a right of set off, and examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Subsection (i) clarifies that no provision of federal or state law relating to the avoidance of preferential or fraudulent transfers (including the anti-preference provision of the National Bank Act) can be invoked to avoid a transfer made in connection with any QFC of an insured depository institution in conservatorship or receivership, absent actual fraudulent intent on the part of the transferee.

Section 902. Authority of the corporation with respect to failed and failing institutions

Section 203 provides that no provision of law, including the Federal Deposit Insurance Corporation Improvement Act (FDICIA), shall be construed to limit the power of the FDIC to transfer or to repudiate any QFC in accordance with its powers under the FDIA. As discussed below, there has been some uncertainty regarding whether or not FDICIA limits the authority of the FDIC to transfer or to repudiate QFCs of an insolvent financial institution. Section 902, as well as other provisions in the Act, clarify that FDICIA does not limit the transfer powers of the FDIC with respect to QFCs.

In addition, section 902 denies enforcement to "walkaway" clauses in QFCs. A walkaway clause is defined as a provision that, after calculation of a value of a party's position or an amount due to or from one of the parties upon termination, liquidation or acceleration of the QFC, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a non-defaulting party.

Section 903. Amendments relating to transfers of qualified financial contracts

Subsection (a) amends the FDIA to expand the transfer authority of the FDIC to permit transfers of QFCs to "financial institutions" as defined in FDICIA or in regulations. This provision allows the FDIC to transfer QFCs to a non-depository financial institution, provided the institution is not subject to bankruptcy or insolvency proceedings. The new FDIA provision specifies that when the FDIC transfers QFCs that are subject to the rules of a particular clearing organization, the transfer will not require the clearing organization to accept the transferee as a

member of the organization. This provision gives the FDIC flexibility in resolving QFCs subject to the rules of a clearing organization, while preserving the ability of such organizations to enforce appropriate risk reducing membership requirements. The new FDIA provision also permits transfers to an eligible financial institution that is a non-U.S. person, or the branch or agency of a non-U.S. person if, following the transfer, the contractual rights of the parties would be enforceable substantially to the same extent as under the FDIA.

Subsection (b) amends the notification requirements following a transfer of the QFCs of a failed depository institution to require the FDIC to notify any party to a transferred QFC of such transfer by 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the FDIC acting as receiver or following the date of such transfer by the FDIC acting as a conservator. This amendment is consistent with the policy statement on QFCs issued by the FDIC on December 12, 1989.

Subsection (c) amends the FDIA to clarify the relationship between the FDIA and FDICIA. There has been some uncertainty whether FDICIA permits counterparties to terminate or liquidate a QFC before the expiration of the time period provided by the FDIA during which the FDIC may repudiate or transfer a QFC in a conservatorship or receivership. Subsection (c) provides that a party may not terminate a QFC based solely on the appointment of the FDIC as receiver until 5:00 p.m. (Eastern Time) on the business day following the appointment of the receiver or after the person has received notice of a transfer under FDIA section 11(d)(9), or based solely on the appointment of the FDIC as conservator, notwithstanding the provisions of FDICIA. This provides the FDIC with an opportunity to undertake an orderly resolution of the insured depository institution. The amendment also prohibits the enforcement of rights of termination or liquidation that are based solely on the "financial condition" of the depository institution in receivership or conservatorship. For example, termination based on a cross-default provision in a QFC that is triggered upon a default under another contract could be stayed if such other default was caused by an acceleration of amounts due under that other contract, and such acceleration was based solely on the appointment of a conservator or receiver for that depository institution. Similarly, a provision in a QFC permitting termination of the QFC based solely on a downgraded credit rating of a party will not be enforceable in an FDIC receivership or conservatorship because the provision is based solely on the financial condition of the depository institution in default. However, any payment, delivery or other performance-based default, or breach of a representation or covenant putting in question the enforceability of the agreement, will not be deemed to be based solely on financial condition for purposes of this provision. The amendment is not intended to prevent counterparties from taking all actions permitted and recovering all damages authorized upon repudiation of any QFC by a conservator or receiver. The amendment allows the FDIC to meet its obligation to provide notice to parties to transferred QFCs by taking steps reasonably calculated to provide notice to such parties by the required time. This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Finally, the amendment permits the FDIC to transfer QFCs of a failed depository institution to a bridge bank or a depository institution organized by the FDIC for which a conservator is appointed either (i) immediately upon the organization of such institution or (ii) at the time of a purchase and assumption transaction between the FDIC and the institution. This provision clarifies that such institutions are not to be considered financial institutions that are

ineligible to receive such transfers under FDIA section 11(e)(9). This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Section 904. Amendments relating to disaffirmance or repudiation of qualified financial contracts

Section 904 limits the disaffirmance and repudiation authority of the FDIC with respect to QFCs so that such authority is consistent with the FDIC's transfer authority under FDIA section 11(e)(9). This ensures that no disaffirmance, repudiation or transfer authority of the FDIC may be exercised to "cherry-pick" or otherwise treat independently all the QFCs between a depository institution in default and a person or any affiliate of such person. The FDIC has announced that its policy is not to repudiate or disaffirm QFCs selectively. This unified treatment is fundamental to the reduction of systemic risk.

Section 905. Clarifying amendment relating to master agreements

Section 905 states that a master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA. This provision ensures that cross-product netting pursuant to a master agreement will be enforceable under the FDIA. Cross-product netting permits a wide variety of financial transactions between two parties to be netted, thereby maximizing the present and potential future risk-reducing benefits of the netting arrangement between the parties. Express recognition of the enforceability of such cross-product master agreements furthers the policy of increasing legal certainty and reducing systemic risks in the case of an insolvency of a large financial participant. Similar Bankruptcy Code clarifications to recognize cross-product netting both under a master agreement and in the absence of a master agreement are described below.

Section 906. Federal Deposit Insurance Corporation Improvement Act of 1991.

Subsection (a)(1) amends the definition of "clearing organization" to include clearinghouses that are subject to exemptions pursuant to orders of the SEC or the CFTC.

The FDICIA provides that a netting arrangement will be enforced pursuant to its terms, notwithstanding the failure of a party to the agreement. However, the current netting provisions of FDICIA limit this protection to "financial institutions," which include depository institutions. Subsection (a)(2) amends the FDICIA definition of covered institutions to include (i) uninsured national and State member banks, irrespective of their eligibility for deposit insurance and (ii) foreign banks (including the foreign bank and its branches or agencies as a combined group, or only the foreign bank parent of a branch or agency). The Federal Reserve Board already has by regulation included certain foreign banks in the definition of a "financial institution" for purposes of FDICIA and the latter change will statutorily extend the protections of FDICIA to ensure that U.S. financial organizations participating in netting agreements with foreign banks are covered by the Act, thereby enhancing the safety and soundness of these arrangements.

Subsection (a)(3) amends FDICIA to provide that, for purposes of FDICIA, two or more clearing organizations that enter into a netting contract are considered "members" of each other.

This assures the enforceability of netting arrangements involving two or more clearing organizations and a member common to all such organizations, thus reducing systemic risk in the event of the failure of such a member. Under the current FDICIA provisions, the enforceability of such arrangements depends on a case-by-case determination that clearing organizations could be regarded as members of each other for purposes of FDICIA.

Subsection (a)(4) amends the FDICIA definition of netting contract and the general rules applicable to netting contracts. The current FDICIA provisions require that the netting agreement must be governed by the law of the United States or a State to receive the protections of FDICIA. However, many of these agreements, particularly netting arrangements covering positions taken in foreign exchange dealings, are governed by the laws of a foreign country. This subsection broadens the definition of "netting contract" to include those agreements governed by foreign law, and preserves the FDICIA requirement that a netting contract is not invalid under or precluded by federal law.

Subsections (b) and (c) establish two exceptions to FDICIA's protection of the enforceability of the provisions of netting contracts between financial institutions and among clearing organization members. First, the termination provisions of netting contracts will not be enforceable based solely on (i) the appointment of a conservator for an insolvent depository institution under the FDIA or (ii) the appointment of a receiver for such institution under the FDIA, if such receiver transfers or repudiates QFCs in accordance with the FDIA and gives notice of a transfer by 5:00 p.m. on the business day following the appointment of a receiver. This change is made to confirm the FDIC's flexibility to transfer or repudiate the QFCs of an insolvent depository institution in accordance with the terms of the FDIA. This modification also provides important legal certainty regarding the treatment of QFCs under the FDIA, because the current relationship between the FDIA and FDICIA is unclear. The second exception provides that FDICIA does not override a stay order under the Securities Investor Protection Act (SIPA) with respect to foreclosure on securities (but not cash) collateral of a debtor (section 911 makes a conforming change to SIPA). There is also an exception relating to insolvent commodity brokers. Subsection (a)(5) adds a new definition of "payment" to FDICIA.

Subsections (b) and (c) also clarify that a security agreement or other credit enhancement related to a netting contract is enforceable to the same extent as the underlying netting contract. Subsection (d) adds a new section 407 to FDICIA. This new section provides that, notwithstanding any other law, QFCs with uninsured national banks or uninsured Federal branches or agencies that are placed in receivership or conservatorship will be treated in the same manner as if the contract were with an insured national bank or insured Federal branch for which a receiver or conservator was appointed. This provision will ensure that parties to QFCs with uninsured national banks or uninsured Federal branches or agencies will have the same rights and obligations as parties entering into the same agreements with insured depository institutions. The new section also specifically limits the powers of a receiver or conservator for an uninsured national bank or uninsured Federal branch or agency to those provisions that address QFCs in section 1821(e)(8), (9), (10), and (11) of title 12 of the United States Code.

While the amendment would apply the same rules to uninsured national banks and Federal branches and agencies that apply to insured institutions, the provision would not change the rules that apply to insured institutions. Nothing in this section would amend the International Banking Act, the Federal Deposit Insurance Act, the National Bank Act, or other statutory provisions with respect to receiverships of insured national banks or Federal branches.

Section 907. Bankruptcy Code amendments

Subsection (a)(1) amends the Bankruptcy Code definitions of "repurchase agreement" and "swap agreement" to conform them with the amendments to the FDIA contained in subsections (e) and (f) of section 901. In connection with the definition of "repurchase agreement," the term "qualified foreign government securities" is defined to include securities that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). This language reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. Any risk presented by this modification is addressed by limiting it to those obligating or guaranteed by OECD member states. Subsection (a)(1) specifies that repurchase obligations under a participation in an commercial mortgage loan do not make the participation agreement a "repurchase agreement." Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer would constitute a "repurchase agreement." The amendments to the definition of "repurchase agreement" are not intended to affect the interpretation of the definition of "securities contract."

The definition of "swap agreement," in conjunction with the addition of "spot foreign exchange transactions" that was added to the definition in 1994, will achieve contractual netting across economically similar over-the-counter products that can be terminated and closed out on a mark-to-market basis. The definition of "swap agreement" originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. For that reason, the phrase "or any other similar agreement" was included in the definition. To clarify this, subsection (a)(1) expands the definition of "swap agreement" to include any agreement or transaction similar to any other agreement or transaction referred to in subsection (a)(1) that is presently, or in the future becomes, regularly entered into in the swap market and is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value. However, traditional commercial and lending arrangements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under either the FDIA or the Bankruptcy Code because the parties purport to document or label the transactions as "swap agreements." Subsection (a)(1) specifies that this definition of swap agreement applies only for purposes of the Bankruptcy Code and is inapplicable to the other statutes, rules and regulations enumerated in that section. The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code and the FDIA. Similar changes are made in the definitions of "forward contract," "commodity contract" and "repurchase agreement." An example of a security arrangement is a right of setoff; examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Subsections (a)(2) and (a)(3) amend the Bankruptcy Code definitions of "securities contract" and "commodity contract," respectively, to conform them to the definitions in the FDIA, and also to include any security agreements or arrangements or other credit enhancements related to one or more such contracts. Subsection (a)(2), like the amendments to the FDIA, amends the definition of "securities contract" to encompass options on securities and margin loans. The inclusion of "margin loans" in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans" and does not include other loans utilizing securities as collateral, however documented. Subsection (a)(2) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute "securities contracts." While a contract for the purchase or sale or a participation may constitute a "securities contract," the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a "securities contract."

Subsection (b) amends the Bankruptcy Code definition of "forward contract merchant" and also adds a new definition of "financial participant" to limit the potential impact of insolvencies upon other major market participants. These definitions will allow such market participants to close-out and net agreements with insolvent entities under sections 362(b)(6), 546, 548, 555, and 556 even if the creditor could not qualify as, for example, a commodity broker. The new subsection preserves the limitations of the right to close-out and net such contracts, in most cases, to entities who qualify under the Bankruptcy Code's counter party limitations. However, where the counter party has transactions with a total gross dollar value of at least $1 billion in notional principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least $100 million (aggregated across counter parties) in one or more agreements or transactions on any day during the previous 15-month period, the new subsection and corresponding amendments would permit it to exercise netting rights irrespective of its inability otherwise to satisfy those counter party limitations. This change will help prevent systemic impacts upon the markets from a single failure.

Subsection (c) adds to the Bankruptcy Code new definitions for the terms "master netting agreement" and "master netting agreement participant." The definition of "master netting agreement" is designed to protect the termination and close-out netting provisions of cross-product master agreements between parties. Such an agreement may be used (i) to document a wide variety of securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements or (ii) as an umbrella agreement for separate master agreements between the same parties, each of which is used to document a discrete type of transaction. The definition includes security agreements or arrangements or other credit enhancements related to one or more such agreements and clarifies that a master netting agreement will be treated as such even if it documents transactions that are not within the enumerated categories of qualifying transactions (but the provisions of the Bankruptcy Code relating to master netting agreements and the other categories of transactions will not apply to such other transactions). A "master netting agreement participant" is any entity that is a party to an outstanding master netting agreement with a debtor before the filing of a bankruptcy petition.

Subsection (d) amends section 362(b) of the Bankruptcy Code to protect enforcement, free from the automatic stay, of setoff or netting provisions in swap agreements and in master netting agreements and security agreements or arrangements related to one or more swap agreements or master netting agreements. This provision parallels the other provisions of the Bankruptcy Code that protect netting provisions of securities contracts, commodity contracts,

forward contracts, and repurchase agreements. Because the relevant definitions include related security agreements, the reference to "setoff" in this provisions, as well as in section 362(b)(6) and (7) of the Bankruptcy Code, are intended to refer also to rights to foreclose on, and to set off against, obligations to return collateral securing swap agreements, master netting arrangements, repurchase agreements, securities contracts, commodity contracts, or forward contracts. Collateral may be pledged to cover the cost of replacing the defaulted transactions in the relevant market, as well as other costs and expenses incurred or estimated to be incurred for the purpose of hedging or reducing the risks arising out of such termination. Enforcement of these agreements and arrangements is consistent with the policy goal of minimizing systemic risk. Subsection (d) also clarifies that the provisions protecting setoff and foreclosure in relation to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements free from the automatic stay apply to collateral pledged by the debtor that is under the control of the creditor but that cannot technically be "held by" the creditor, such as receivables and book-entry securities, and to collateral that has been repledged by the creditor.

Subsection (e) amends section 546 of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud. This section of the Act also clarifies the limitations on a trustee's power to avoid transfers made under swap agreements.

Subsection (f) amends section 548(d) of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud. This amendment provides the same protections for transfers made under, or in connection with, master netting agreements as currently is provided for margin payments and settlement payments received by commodity brokers, forward contract merchants, stockbrokers, financial institutions, securities clearing agencies, repo participants, and swap participants under sections 546 and 548(d).

Subsections (g), (h), (i), and (j) clarify that the provisions of the Bankruptcy Code that protect (i) rights of liquidation under securities contracts, commodity contracts, forward contracts and repurchase agreements also protect rights of termination or acceleration under such contracts, and (ii) rights to terminate under swap agreements also protect rights of liquidation and acceleration.

Subsection (k) adds a new section 561 to the Bankruptcy Code to protect the contractual right of a master netting agreement participant to enforce any rights of termination, liquidation, acceleration, offset or netting under a master netting agreement. Such rights include rights arising (i) from the rules of a securities exchange or clearing organization, (ii) under common law, law merchant or (iii) by reason of normal business practice. This is consistent with the current treatment of rights under swap agreements pursuant to section 560 of the Bankruptcy Code. With respect to sections 555, 556, 559, 560 and 561 of the Bankruptcy Code, it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party. The protection of netting and offset rights in

sections 560 and 561 is in addition to the protections afforded in subsections 362(b)(6), (b)(7), (b)(17) and (b)(32). For example, cross-product netting will be protected from the automatic stay under section 561 even in the absence of a master netting agreement. Sections 561(b)(2) and (3) limit the exercise of contractual rights to net or to offset obligations where one leg of the obligations sought to be netted relates to commodity contracts. Under subsection (b)(2), netting or offset is not permitted if the obligations are not mutual. This means, for example, that proprietary obligations cannot be netted or offset against obligations held for, or on behalf of, some other party. Even if the obligations are mutual, under subsection (b)(3) netting or offset is not permitted in a commodity broker bankruptcy if the party seeking to net or to offset has no positive net equity in the commodity account at the debtor. Subsections (b)(2) and (b)(3) limit the depletion of assets available for distribution to customers of commodity brokers. This is consistent with the principle of subchapter IV of chapter 7 of the Bankruptcy Code, which gives priority to customer claims in the bankruptcy of a commodity broker.

Under this provision, the termination, liquidation or acceleration rights of a master netting agreement participant are subject to limitations contained in other provisions of the Bankruptcy Code relating to securities contracts and repurchase agreements. In particular, if a securities contract or repurchase agreement is documented under a master netting agreement, a party's termination, liquidation and acceleration rights would be subject to the provisions of the Bankruptcy Code relating to orders authorized under the provisions of SIPA or any statute administered by the Section In addition, the netting rights of a party to a master netting agreement would be subject to any contractual terms between the parties limiting or waiving netting or set off rights. Similarly, a waiver by a bank or a counter party of netting or set off rights in connection with QFCs would be enforceable under the FDIA.

Subsection (l) clarifies that, with respect to municipal bankruptcies, all the provisions of the Bankruptcy Code relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements (which by their terms are intended to apply in all cases and proceedings under the Bankruptcy Code) will apply in a chapter 9 case. Although sections 555, 556, 559, and 560 provide that they apply in any case or proceeding under the Bankruptcy Code, this subsection makes a technical amendment in chapter 9 to clarify the applicability of these provisions.

Subsection (m) clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a section 304 proceeding ancillary to a foreign insolvency proceeding.

Subsections (n) and (o) amend those provisions in the Bankruptcy Code concerning the liquidation of commodity brokers and stockbrokers. Subchapter III of chapter 7 of the Bankruptcy Code details specific rules for the liquidation of stockbrokers. Subchapter IV of chapter 7 of the Bankruptcy Code and regulations of the CFTC detail specific rules for the liquidation of commodity brokers. These authorities are designed to protect customers and customer property of an insolvent stockbroker or commodity broker.

Subsections (n) and (o) clarify the rights of parties to commodity contracts, securities contracts, forward contracts, swap agreements, repurchase agreements and master netting agreements with an insolvent commodity broker or stockbroker. They ensure that non-customers will not defeat the priority scheme of subchapter III or IV priority by gaining access to assets held in segregated customer accounts. The subsections also clarify that the exercise of

termination and netting rights will not otherwise affect customer property or distributions by the trustee of the insolvent commodity broker or stockbroker after the exercise of such rights.

Subsection (p) amends section 553 of the Bankruptcy Code to clarify that the acquisition by a creditor of setoff rights in connection with swap agreements, repurchase agreements, securities contracts, forward contracts, commodity contracts and master netting agreements cannot be avoided as a preference. This subsection also adds setoff of the kinds described in sections 555, 556, 559, 560, and 561 of the Bankruptcy Code to the types of set off excepted from section 553(b).

Section 908. Recordkeeping requirements

Section 908 amends section 11(e)(8) of the FDIA to explicitly authorize the FDIC, in consultation with appropriate Federal banking agencies, to prescribe regulations on recordkeeping with respect to QFCs. Adequate recordkeeping for such transactions is essential to effective risk management and to the reduction of systemic risk permitted by the orderly resolution of depository institutions utilizing QFCs.

Section 909. Exemptions from contemporaneous execution requirement

Section 909 amends section 13(e)(2) of the FDIA to provide that an agreement for the collateralization of governmental deposits, bankruptcy estate funds, Federal Reserve Bank or Federal Home Loan Bank extensions of credit or one or more QFCs shall not be deemed invalid solely because such agreement was not entered into contemporaneously with the acquisition of the collateral or because of pledges, delivery or substitution of the collateral made in accordance with such agreement. The amendment codifies portions of policy statements issued by the FDIC regarding the application of section 13(e), which codifies the "*Oench Duhme*" doctrine. With respect to QFCs, this codification recognizes that QFCs often are subject to collateral and other security arrangements that may require posting and return of collateral on an ongoing basis based on the mark-to-market values of the collateralized transactions. The codification of only portions of the existing FDIC policy statements on these and related issues should not give rise to any negative implication regarding the continued validity of these policy statements.

Section 910. Damage measure

Section 910 adds a new section 562 to the Bankruptcy Code providing that damages under any swap agreement, securities contract, forward contract, commodity contract, repurchase agreement or master netting agreement be calculated as of the earlier of (i) the date of rejection of such agreement by a trustee or (ii) the date of liquidation, termination or acceleration of such contract or agreement. New section 562 provides important legal certainty and makes the Bankruptcy Code consistent with the current provisions related to the timing of the calculation of damages under QFCs in the FDIA.

Section 911. SIPC stay

Section 911 amends SIPA to provide that an order or decree issued pursuant to SIPA shall not operate as a stay of any right of liquidation, termination, acceleration, offset or netting under one or more securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements (as defined in the Bankruptcy Code and including rights of foreclosure on collateral), except that such order or decree may stay any right to foreclose on securities (but not cash) collateral pledged by the debtor or sold by the debtor under a repurchase agreement (a corresponding amendment to FDICIA is made by the Act). A creditor that was stayed in exercising rights against securities collateral would be entitled to post-insolvency interest to the extent of the collateral.

Section 912. Asset-backed securitizations

Section 912 amends section 541 of the Bankruptcy Code to provide that certain assets transferred to an eligible entity in connection with an asset-backed securitization generally will not be included within the bankruptcy estate of the debtor. This provision recognizes that a valid transfer of such assets to an "eligible entity," generally eliminates the debtor's legal or equitable interests in those assets. Accordingly, subject to the avoidance powers in section 548(a), the transfer will be treated as a sale of those assets not subject to avoidance.

Section 913. Effective date; application of amendments

Section 913(a) provides that title IX become effective on the Act's date of enactment. Section 913(b) provides that the amendments made by the Act shall not apply with respect to cases commenced, or to conservator and receiver appointments made before the date of enactment.

TITLE X – PROTECTION OF FAMILY FARMERS

Section 1001. Permanent reenactment of chapter 12

Section 1001(a) reenacts chapter 12 of the Bankruptcy Code and provides that such reenactment takes effect on July 1, 2000. Section 1001(b) makes a conforming amendment to section 302 of the Bankruptcy, Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.

Section 1002. Debt limit increase

Section 1002 amends section 104(b) of the Bankruptcy Code to provide for annual or biannual adjustments of the debt limit for family farmers beginning on April 1, 2004.

Section 1003. Certain claims owed to governmental units

Section 1003(a) amends section 1222(a) of the Bankruptcy Code to require a chapter 12 plan provide for payment in full of all claims entitled to priority under section 507, unless the claim is owed to a governmental unit arising from the sale or exchange of any farm asset. If the

claim falls within this exception, it is treated as an unsecured claim and the underlying debt is treated the same if the debtor receives a discharge or the holder of a claim agrees to a different treatment of that claim. Section 1003(b) amends section 1231(b) of the Bankruptcy Code to have it apply to any governmental unit.

TITLE XI – HEATH CARE AND EMPLOYEE BENEFITS

Section 1101. Definitions

Section 1101(a) amends section 101 of the Bankruptcy Code to add a definition of the term "health care business." A health care business is defined as any public or private entity (without regard as to whether the entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for certain specified purposes. Section 1101(b) amends section 101 of the Bankruptcy Code to define "patient" and "patient records." Section 1101(c) clarifies that the amendments implemented by section 1101(a) are not intended to affect the interpretation of section 109(b) of the Bankruptcy Code concerning an entity's eligibility to be a chapter 7 debtor.

Section 1102. Disposal of patient records

Section 1102 adds a provision to chapter 3 of the Bankruptcy Code specifying requirements for the disposal of patient records in a chapter 7, 9, or 11 case of a health care business where the trustee lacks sufficient funds to pay for the storage of such records in accordance with applicable Federal or state law. The requirements chiefly consist of providing notice to the affected patients and specifying the method of disposal for unclaimed records. These requirements are intended to protect the privacy and confidentiality of a patient's medical records when they are in the custody of a health care business in bankruptcy.

Section 1103. Administrative expense claim for costs of closing a health care business and other administrative expenses

Section 1103 amends section 503(b) of the Bankruptcy Code to provide that the actual, necessary costs and expenses of closing a health care business (including the disposal of patient records or transferral of patients) incurred by a trustee, Federal agency, or a department or agency of a State are allowed administrative expenses.

With respect to a nonresidential real property lease previously assumed under section 365 and then subsequently rejected, section 1103 amends section 503(b) to provide that the sum of all monetary obligations due (excluding those arising from or related to a failure to operate or penalty provisions) for the two-year period following the later of the rejection date or date of actual turnover of the premises (without reduction or setoff for any reason, except for sums actually received or to be received from a nondebtor) are allowed administrative expenses under section 503(b) of the Bankruptcy Code. The claim for remaining sums due for the balance of the lease's term shall be treated as a claim under section 502(b)(6).

Section 1104. Appointment of ombudsman to act as patient advocate

Section 1104(a) adds a provision to chapter 3 of the Bankruptcy Code requiring the court to order the appointment of an ombudsman within 30 days after the commencement of a chapter 7, 9 or 11 case by a health care provider, unless the court finds that such appointment is not necessary for the protection of patients under the specific facts of the case. Section 1104(a) requires the ombudsman to be a disinterested person. Pursuant to this provision, the ombudsman is responsible for monitoring the quality of patient care and to represent the interests of the patients. Within 60 days after his or her appointment, the ombudsman must report to the court at a hearing or in writing on the quality of patient care at the health care business. Subsequent reports are due not less frequently than every 60 days thereafter. If the ombudsman determines that the quality of patient care is declining significantly or is otherwise being materially compromised, the ombudsman must immediately notify the court by motion or written report (on notice to appropriate parties in interest). Section 1104(a) specifies that the ombudsman must maintain any information he or she obtains relating to patients as confidential. The ombudsman may not review confidential patient records unless the court provides prior approval, with restrictions to protect the confidentiality of such records.

Section 1104(b) amends section 330(a)(1) of the Bankruptcy Code to authorize the payment of reasonable compensation to an ombudsman.

Section 1105. Debtor in possession; duty of trustee to transfer patients

Section 1105 amends section 704 of the Bankruptcy Code to require a chapter 7 trustee, chapter 11 trustee, or a chapter 11 debtor in possession to use all reasonable and best efforts to transfer patients from a health care business that is being closed to an appropriate health care business. The transferee health care business should be in the vicinity of the transferor health care business, provide the patient with services that are substantially similar to those provided by the transferor health care business, and maintain a reasonable quality of care.

Section 1106. Exclusion from program participation not subject to automatic stay

Section 1106 amends section 362(b) of the Bankruptcy Code to except from the automatic stay the exclusion by the Secretary of Health and Human Services of a debtor from participation in the medicare program or other specified Federal health care programs.

TITLE XII – TECHNICAL AMENDMENTS

Section 1201. Definitions

Section 1201 amends the definitions contained in section 101 of the Bankruptcy Code. Paragraphs (1), (2), (4), and (7) of section 1201 make technical changes to section 101 to convert each definition into a sentence (thereby facilitating future amendments to the separate paragraphs) and to redesignate the definitions in correct and completely numerical sequence. Paragraph (3) of section 1101 makes necessary and conforming amendments to cross references to the newly redesignated definitions.

Paragraph (5) of section 1201 concerns single asset real estate debtors. A single asset real estate chapter 11 case presents special concerns. As the name implies, the principal asset in this type of case consists of some form of real estate, such as undeveloped land. Typically, the form

of ownership of a single asset real estate debtor is a corporation or limited partnership. The largest creditor in a single asset real estate case is typically the secured lender who advanced the funds to the debtor to acquire the real property. Often, a single asset real estate debtor resorts to filing for bankruptcy relief for the sole purpose of staying an impending foreclosure proceeding or sale commenced by the secured lender. Foreclosure actions are filed when the debtor lacks sufficient cash flow to service the debt and maintain the property. Taxing authorities may also have liens against the property. Based on the nature of its principal asset, a single asset real estate debtor often has few, if any, unsecured creditors. If unsecured creditors exist, they may have only nominal claims against the single asset real estate debtor. Depending on the nature and ownership of any business operating on the debtor's real property, the debtor may have few, if any, employees. Accordingly, there may be little interest on behalf of unsecured creditors in a single asset real estate case to serve on a creditors' committee.

In 1994, the Bankruptcy Code was amended to accord special treatment for a single asset real estate debtor. It defined this type of debtor as a bankruptcy estate comprised of a single piece of real property or project, other than residential real property with fewer than four residential units. The property or project must generate substantially all of the debtor's gross income. A debtor that conducts substantial business on the property beyond that relating to its operation is excluded from this definition. In addition, the definition fixed a monetary cap. To qualify as a single asset real estate debtor, the debtor could not have noncontingent, liquidated secured debts in excess of $4 million.[71]

Subparagraph (5)(A) amends the definition of ``single asset real estate'' to exclude family farmers from this definition. Paragraph (5)(B) amends section 101(51B) of the Bankruptcy Code to eliminate the $4 million debt limitation on single asset real estate. The present $4 million cap prevents the use of the expedited relief procedure in many commercial property reorganizations, and effectively provides an opportunity for a number of debtors to abusively file for bankruptcy in order to obtain the protection of the automatic stay against their creditors. As a result of this amendment, creditors in more cases will be able to obtain the expedited relief from the automatic stay which is made available under section 362(d)(3) of the Bankruptcy Code.

Paragraph (6) of section 1201, together with section 1214, respond to a 1997 Ninth Circuit case,[72] in which two purchase money lenders (without knowledge that the debtor had

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[71]*See* 11 U.S.C. 101(51B).

[72]Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir.), *cert. denied* 522 U.S. 966 (1997). The bankruptcy trustee sought to avoid the lien created by the lenders' deed of trust by asserting that the deed was an unauthorized, postpetition transfer under section 549(a) of the Bankruptcy Code. The lenders claimed that the voluntary transfer to them was a transfer of real property to good faith purchasers for value, which was thereby excepted it, under section 549(c) of the Bankruptcy Code, from avoidance. The bankruptcy court held that the postpetition recordation of the lenders' deed of trust was without authorization under the Bankruptcy Code or by the court and was therefore avoidable under section 549(a), and that the lenders did not qualify under the section 549(c) exception as good faith purchasers of real property for value. The District Court subsequently affirmed the bankruptcy court's ruling granting the trustee the authority to avoid the lenders' lien. *In re* McConville, D.C. No. CV 94 03308 FMS (N.D. Cal.1994). On appeal, the lower court's decision in *McConville* was initially affirmed. The Ninth

recently filed an undisclosed chapter 11 case that was subsequently converted to chapter 7), funded the debtor's acquisition of an apartment complex and recorded their purchase-money deed of trust immediately following recordation of the deed to the debtors. Specifically, it amends the definition of ``transfer'' in section 101(54) of the Bankruptcy Code to include the ``creation of a lien.'' This amendment gives expression to a widely held understanding since the enactment of the Bankruptcy Reform Act of 1978,[73] that is, a transfer includes the creation of a lien.

Section 1202. Adjustment of dollar amounts

Section 1202 corrects an omission in section 104(b) of the Bankruptcy Code to include a reference to section 522(f)(3).

Section 1203. Extension of time

Section 1203 makes a technical amendment to correct a reference error described in amendment notes contained in the United States Code. As specified in the amendment note relating to subsection (c)(2) of section 108 of the Bankruptcy Code, the amendment made by section 257(b)(2)(B) of Public Law 99-554 could not be executed as stated.

Section 1204. Technical amendments

Section 1204 makes technical amendments to sections 109(b)(2) (to strike an statutory cross reference), 541(b)(2) (to add ``or'' to the end of this provision), and 522(b)(1) (to replace ``product'' with ``products'').

Section 1205. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

Section 1205 amends section 110(j)(4) of the Bankruptcy Code to change the reference to attorneys from the singular possessive to the plural possessive.

Section 1206. Limitation on compensation of professional persons

Section 328(a) of the Bankruptcy Code provides that a trustee or a creditors' and equity security holders' committee may, with court approval, obtain the services of a professional person on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Section 1206 amends section 328(a) to include compensation ``on a fixed or percentage fee basis'' in addition to the other specified forms of reimbursement.

Circuit, however, subsequently issued an amended opinion, also affirming the lower court, and finally issued an opinion withdrawing its prior opinion and deciding the case on other grounds. It held that by obtaining secured credit from the lenders, after filing but before the appointment of a trustee, the debtors violated their fiduciary responsibility to their creditors.

[73]Pub. L. No. 95-598, 92 Stat. 2549 (1978).

Section 1207. Effect of conversion

Section 1207 makes a technical correction in section 348(f)(2) of the Bankruptcy Code to clarify that the first reference to property, like the subsequent reference to property, is a reference to property of the estate.

Section 1208. Allowance of administrative expenses

Section 1208 amends section 503(b)(4) of the Bankruptcy Code to limit the types of compensable professional services rendered by an attorney or accountant that can qualify as administrative expenses in a bankruptcy case. Expenses for attorneys or accountants incurred by individual members of creditors' or equity security holders' committees are not recoverable, but expenses incurred for such professional services incurred by such committees themselves would be.

Section 1209. Exceptions to discharge

Section 1209 of the bill amends section 523(a) of the Bankruptcy Code to correct a technical error in the placement of paragraph (15), which was added to section 523 by section 304(e)(1) of the Bankruptcy Reform Act of 1994. This provision also amends section 523(a)(9), which makes nondischargeable any debt resulting from death or personal injury arising from the debtor's unlawful operation of a motor vehicle while intoxicated, to add ``watercraft, or aircraft" after ``motor vehicle." Neither additional term should be defined or included as a ``motor vehicle" in section 523(a)(9) and each is intended to comprise unpowered as well as motor-powered craft. Congress previously made the policy judgment that the equities of persons injured by drunk drivers outweigh the responsible debtor's interest in a fresh start, and here clarifies that the policy applies not only on land but also on the water and in the air. Viewed from a practical standpoint, this provision closes a loophole that gives intoxicated watercraft and aircraft operators preferred treatment over intoxicated motor vehicle drivers and denies victims of alcohol and drug related boat and plane accidents the same rights accorded to automobile accident victims under current law. Finally, this section amends corrects a grammatical error in section 523(e).

Section 1210. Effect of discharge

Section 1210 makes technical amendments to correct errors in section 524(a)(3) of the Bankruptcy Code caused by section 257(o)(2) of Public Law 99-554 and section 501(d)(14)(A) of Public Law 103-394.[74]

Section 1211. Protection against discriminatory treatment

Section 1211 conforms a reference to its antecedent reference in section 525(c) of the Bankruptcy Code. The omission of ``student" before ``grant" in the second place it appears in

[74]For a description of these errors, see the appropriate footnote and amendment notes in the United States Code.

section 525(c) made possible the interpretation that a broader limitation on lender discretion was intended, so that no loan could be denied because of a prior bankruptcy if the lending institution was in the business of making student loans. Section 1211 is intended to make clear that lenders involved in making government guaranteed or insured student loans are not barred by this Bankruptcy Code provision from denying other types of loans based on an applicant's bankruptcy history; only student loans and grants, therefore, cannot be denied under section 525(c) because of a prior bankruptcy.

Section 1212. Property of the estate

Production payments are royalties tied to the production of a certain volume or value of oil or gas, determined without regard to production costs. They typically would be paid by an oil or gas operator to the owner of the underlying property on which the oil or gas is found. Under section 541(b)(4)(B)(ii) of the Bankruptcy Code, added by the Bankruptcy Reform Act of 1994, production payments are generally excluded from the debtor's estate, provided they could be included only by virtue of section 542 of the Bankruptcy Code, which relates generally to the obligation of those holding property which belongs in the estate to turn it over to the trustee. Section 1212 adds to this proviso a reference to section 365 of the Bankruptcy Code, which authorizes the trustee to assume or reject an executory contract or unexpired lease. It thereby clarifies the original Congressional intent to generally exclude production payments from the debtor's estate.

Section 1213. Preferences

Section 547 of the Bankruptcy Code authorizes a trustee to avoid a preferential payment made to a creditor by a debtor within 90 days of filing, whether the creditor is an insider or an outsider. Because of the concern that a corporate insider (such as an officer or directors who is a creditor of his or her own corporation has an unfair advantage over outside creditors, section 547 also authorizes a trustee to avoid a preferential payment made to an insider creditor between 90 days and one year before filing. Several recent cases, including *DePrizio*,[75] allowed the trustee to ``reach-back'' and avoid a transfer to a noninsider creditor which fell within the 90-day to one-year time frame if an insider benefitted from the transfer in some way. This had the effect of discouraging lenders from obtaining loan guarantees, lest transfers to the lender be vulnerable to recapture by reason of the debtor's insider relationship with the loan guarantor. Section 202 of the Bankruptcy Reform Act of 1994 addressed the *DePrizio* problem by inserting a new section 550(c) into the Bankruptcy Code to prevent avoidance or recovery from a noninsider creditor during the 90-day to one-year period even though the transfer to the noninsider benefitted an insider creditor. The 1994 amendments, however, failed to make a corresponding amendment to section 547, which deals with the avoidance of preferential transfers. As a result, a trustee could still utilize section 547 to avoid a preferential lien given to a noninsider bank, more than 90 days

[75]Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989); *see, e.g.*, Ray v. City Bank and Trust Co. (*In re* C-L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990); Manufacturers Hanover Leasing Corp. v. Lowrey (*In re* Robinson Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir. 1989).

but less than one year before bankruptcy, if the transfer benefitted an insider guarantor of the debtor's debt. Accordingly, section 1213 makes a perfecting amendment to section 547 to provide that if the trustee avoids a transfer given by the debtor to a noninsider for the benefit of an insider creditor between 90 days and one year before filing, that avoidance is valid only with respect to the insider creditor. Thus both the previous amendment to section 550 and the perfecting amendment to section 547 protect the noninsider from the avoiding powers of the trustee exercised with respect to transfers made during the 90-day to one year pre-filing period.

Section 1214. Postpetition transactions

Section 1214 amends section 549(c) of the Bankruptcy Code to clarify its application to an interest in real property. This amendment should be construed in conjunction with section 1201 of the Act.

Section 1215. Disposition of property of the estate

Section 1215 of the bill amends section 726(b) of the Bankruptcy Code to strike an erroneous reference to a nonexistent section.[76]

Section 1216. General provisions

Section 1216 amends section 901(a) of the Bankruptcy Code to correct an omission in a list of sections applicable to cases under chapter 9 of title 11 of the United States Code.

Section 1217. Abandonment of railroad line

Section 1217 amends section 1170(e)(1) of the Bankruptcy Code to reflect the fact that section 11347 of title 49 of the United States Code was repealed by section 102(a) of Public Law 104-88 and that provisions comparable to section 11347 appear in section 11326(a) of title 49 of the United States Code.

Section 1218. Contents of plan

Section 1218 amends section 1172(c)(1) of the Bankruptcy Code to reflect the fact that section 11347 of title 49 of the United States Code was repealed by section 102(a) of Public Law 104-88 and that provisions comparable to section 11347 appear in section 11326(a) of title 49 of the United States Code.

Section 1219. Discharge under chapter 12

Section 1219 amends section 1228 of the Bankruptcy Code, dealing with discharge under chapter 12, to correct erroneous references.

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[76]For a description of the error, see the appropriate footnote and amendment notes in the United States Code.

Section 1220. Bankruptcy cases and proceedings

Section 1220 amends section 1334(d) of title 28 of the United States Code to correct erroneous references.[77]

Section 1221. Knowing disregard of bankruptcy law or rule

This section amends section 156(a) of title 18 of the United States Code to make stylistic changes and correct a reference to the Bankruptcy Code.

Section 1222. Transfers made by nonprofit charitable corporations

Section 1222 amends section 363(d) of the Bankruptcy Code to restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust. First, the use, sell or lease must be in accordance with applicable nonbankruptcy law and to the extent it is not inconsistent with any relief granted under certain specified provisions of section 362 of the Bankruptcy Code concerning the applicability of the automatic stay. Second, section 1222 imposes similar restrictions with regard to plan confirmation requirements for chapter 11 cases. Third, it amends section 541 of the Bankruptcy Code to provide that any property of a bankruptcy estate in which the debtor is a nonprofit corporation (as described in certain provisions of the Internal Revenue Code) may not be transferred to an entity that is not a corporation, but only under the same conditions that would apply if the debtor was not in bankruptcy. The amendments made by this section apply to cases pending on the date of enactment or to cases filed after such date. Section 1222 provides that a court may not confirm a plan without considering whether this provision would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor postpetition. Nothing in this provision may be construed to require the court to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.

Section 1223. Protection of valid purchase money security interests

Section 1223 extends the applicable perfection period for a security interest in property of the debtor in section 547(c)(3)(B) of the Bankruptcy Code from 20 to 30 days.

Section 1224. Bankruptcy judgeships

The substantial increase in bankruptcy case filings clearly creates a need for additional bankruptcy judgeships. In the 105th Congress, the House responded to this need by passing H.R. 1596, which would have created additional permanent and temporary bankruptcy judgeships and

[77]For a description of the errors, see the appropriate footnote and amendment notes in the United States Code.

extended an existing temporary position. Section 1224 generally incorporates H.R. 1596 as it passed the House with provisions extending five existing temporary judgeships.

Section 1225. Compensating trustees

Section 1225 amends section 1326 of the Bankruptcy Code to provide that if a chapter 7 trustee has been allowed compensation as a result of the conversion or dismissal of the debtor's prior case pursuant to section 707(b) and some portion of that compensation remains unpaid, the amount of any such unpaid compensation must be repaid in the debtor's subsequent chapter 13 case. This payment must be prorated over the term of the plan and paid on a monthly basis. The amount of the monthly payment may not to exceed the greater of $25 or the amount payable to unsecured nonpriority creditors as provided by the plan, multiplied by five percent and the result divided by the number of months of the plan.

Section 1226. Amendment to section 362 of title 11, United States Code

Section 1226 amends section 362(b) of the Bankruptcy Code to except from the automatic stay the creation or perfection of a statutory lien for an *ad valorem* property tax or for a special tax or special assessment on real property (whether or not *ad valorem*) that is imposed by a governmental unit, if such tax or assessment becomes due after the filing of the petition.

Section 1227. Judicial education

Section 1227 requires the Director of the Federal Judicial Center, in consultation with the Director of the Executive Office for United States Trustees, to develop materials and conduct training as may be useful to the courts in implementing this Act, including the needs-based reforms under section 707(b) (as amended by this Act) and amendments pertaining to reaffirmation agreements.

Section 1228. Reclamation

Section 1228(a) amends section 546 of the Bankruptcy Code to provide that the rights of a trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods to reclaim goods sold in the ordinary course of business to the debtor if (1) the debtor received these goods while insolvent, and (2) written demand for reclamation of the goods is made not later than 45 days after their receipt by the debtor or within 20 days after the commencement of the bankruptcy case. This provision specifies, however, that it is subject to sections 546(d) and 507(c) as well as the prior rights of holders of security interests in such goods or the proceeds thereof. If the seller fails to provide the notice described in this provision, such seller may still assert the rights specified in section 503(b)(7).

Section 1228(b) amends section 503(b) to provide that the value of any goods received by a debtor not later than 20 days after the commencement of a bankruptcy case in which the goods have been sold to the debtor in the ordinary course of the debtor's business is an allowed administrative expense.

Section 1229. Providing requested tax documents to the court

Section 1229(a) provides that the court may not grant a discharge to an individual in a case under chapter 7 unless requested tax documents have been provided to the court. Section 1229(b) similarly provides that the court may not confirm a chapter 11 or 13 plan unless requested tax documents have been filed with the court. Section 1229(c) directs the court to destroy documents submitted in support of a bankruptcy claim not sooner than three years after the date of the conclusion of a bankruptcy case filed by an individual debtor under chapter 7, 11 or 13. In the event of a pending audit or enforcement action, the court may extend the time for destruction of such requested tax documents.

Section 1230. Encouraging creditworthiness

Section 1230(a) expresses the sense of the Congress that lenders may sometimes offer credit to consumers indiscriminately and that resulting consumer debt may be a major contributing factor leading to consumer insolvency.

Section 1230(b) directs the Board of Governors of the Federal Reserve System (Board) to study certain consumer credit industry solicitation and credit granting practices as well as the effect of such practices on consumer debt and insolvency. The specified practices involve the solicitation and extension of credit on an indiscriminate basis that encourages consumers to accumulate additional debt and where the lender fails to ensure that the consumer borrower is capable of repaying the debt.

Section 1230(c) requires the study described in subsection (b) to be prepared within 12 months from the date of the Act's enactment. This provision authorizes the Board to issue regulations requiring additional disclosures to consumers and permits it to undertake any other actions consistent with its statutory authority, which are necessary to ensure responsible industry practices and to prevent resulting consumer debt and insolvency.

Section 1231. Property no longer subject to redemption

Section 1231 amends section 541(b) of the Bankruptcy Code to provide that, under certain circumstances, an interest of the debtor in tangible personal property (other than securities, or written or printed evidences of indebtedness or title) that the debtor pledged or sold as collateral for a loan or advance of money given by a person licensed under law to make such loan or advance is not property of the estate. Subject to subchapter III of chapter 5 of the Bankruptcy Code, the provision applies where (a) the property is in the possession of the pledgee or transferee; (b) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and (c) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law in a timely manner as provided under State law and section 108(b) of the Bankruptcy Code.

Section 1232. Trustees

Section 1232 establishes a series of procedural protections for chapter 7 and chapter 13 trustees concerning final agency decisions relating to trustee appointments and future case

assignments. Section 1232(a) amends section 586(d) of title 28 of the United States Code to allow a chapter 7 or chapter 13 trustee to obtain judicial review of such decisions by commencing an action in the United States district court after the trustee exhausts all available administrative remedies. Unless the trustee elects an administrative hearing on the record, the trustee is deemed to have exhausted all administrative remedies under this provision if the agency fails to make a final agency decision within 90 days after the trustee requests an administrative remedy. Section 1232(a) requires the Attorney General to promulgate procedures to implement this provision. It further provides that the agency's decision must be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency.

Section 1232(b) amends section 586(e) of title 28 of the United States Code to permit a chapter 13 trustee to obtain judicial review of certain final agency actions relating to claims for actual, necessary expenses under section 586(e). The trustee may commence an action in the United States district court where the trustee resides. The agency's decision must be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency. It directs the Attorney General to prescribe procedures to implement this provision.

Section 1233. Bankruptcy forms

Section 1233 amends section 2075 of title 28 of the United States Code to require the bankruptcy rules promulgated under this provision to prescribe a form for the statement specified under section 707(b)(2)(C) of the Bankruptcy Code and to provide general rules on the content of such statement.

Section 1234. Expedited appeals of bankruptcy cases to courts of appeals

Currently, appeals from decisions rendered by the bankruptcy court are either heard by the district court or a bankruptcy appellate panel. In addition to the time and cost factors attendant to the present appellate system, decisions rendered by a district court as an appellate court are not binding and lack *stare decisis* value.

To address these problems, section 1234(a) amends section 158(d) of title 28 of the United States Code to deem a judgment, decision, order, or decree of a bankruptcy judge to be a judgment, decision, order, or decree of the district court entered 31 days after an appeal of such judgment, decision, order or decree is filed with the district court, unless certain factors apply. These factors are (a) the district court issues a decision on the appeal within 30 days after such appeal is filed or enters an order extending the 30-day period for cause upon motion of a party or by the court *sua sponte*; or (b) all parties to the appeal file written consent that the district court may retain such appeal until it enters a decision. For purposes of this provision, section 1234(a) provides that an appeal is considered filed with the district court on the date on which the notice of appeal is filed, except in a case where a party has made an election that the appeal be heard by the district court. If the appellant so elects, then the appeal is considered filed with the district court on the date such election is made.

Section 1234(a) provides that the courts of appeals shall have jurisdiction of appeals from (1) all final judgments, decisions, orders, and decrees of district courts entered under section 158(a); (2) all final judgments, decisions, orders, and decrees of bankruptcy appellate panels entered under section 158(b); (3) all judgments, decisions, orders, and decrees of district courts entered under section 158(d) (as amended by this Act) to the extent they are reviewable by a district court pursuant to section 158(a). Section 1234(a) further provides that the court of appeals may use its discretion, in accordance with rules prescribed by the Supreme Court, to exercise jurisdiction over an appeal from an interlocutory judgment, decision, order, or decree under section 158(e)(3) (as added by this Act).

Section 1234(b) makes technical and conforming amendments to implement this provision.

Section 1235. Exemptions

Section 1235 makes a conforming amendment to section 522(g)(2) of the Bankruptcy Code.

TITLE XIII – CONSUMER CREDIT DISCLOSURE

Section 1301. Enhanced disclosures under an open end credit plan

Section 1301(a) amends section 127(b) of the Truth in Lending Act to mandate the inclusion of certain specified disclosures in billing statements with respect to various open end credit plans. In general, these statements must contain an example of the time it would take to repay a stated balance at a specified interest rate. In addition, they must warn the borrower that making only the minimum payment will increase the amount of interest that must be paid and the time it takes to repay the balance. Further, a toll-free telephone number must be provided where the borrower can obtain an estimate of the time it would take to repay the balance if only minimum payments are made. With respect to a creditor whose compliance with title 15 of the United States Code is enforced by the Federal Trade Commission (FTC), the billing statement must advise the borrower to contact the FTC at a toll-free telephone number to obtain an estimate of the time it would take to repay the borrower's balance. Section 1401(a) permits the creditor to substitute an example based on a higher interest rate. As necessary, the provision requires the Board of Governors of the Federal Reserve System ("Board"), to periodically recalculate by rule the interest rate and repayment periods specified in Section 1401(a). With respect to the toll-free telephone number, section 1401(a) permits a third party to establish and maintain it. Under certain circumstances, the toll-free number may connect callers to an automated device.

For a period not to exceed 24 months from the effective date of the Act, the Board is required to establish and maintain a toll-free telephone number (or provide a toll-free telephone number established and maintained by a third party) for use by creditors that are depository institutions (as defined in section 3 of the Federal Deposit Insurance Act), including a Federal or State credit union (as defined in section 101 of the Federal Credit Union Act), with total assets not exceeding $250 million. Not later than six months prior to the expiration of the 24-month period, the Board must submit a report on this program to the Committee on Banking, Housing,

and Urban Affairs of the Senate, and the Committee on Banking and Financial Services of the House of Representatives.

In addition, section 1301(a) requires the Board to establish a detailed table illustrating the approximate number of months that it would take to repay an outstanding balance if a consumer pays only the required minimum month payments and if no other advances are made. The table should reflect a significant number of different annual percentage rates, and account balances, minimum payment amounts. The Board must also promulgate regulations providing instructional guidance regarding the manner in which the information contained in the tables should be used to respond to a request by an obligor under this provision. Section 1401(a) provides that the disclosure requirements of this provision are inapplicable to any charge card account where the primary purpose of which is to require payment of charges in full each month.

Section 1301(b)(1) requires the Board to promulgate regulations implementing section 1301(a)'s amendments to section127. Section 1301(b)(2) specifies that the effective date of the amendments under subsection (a) and the regulations required under this provision shall not take effect until the later of 18 months after the date of enactment of this Act or 12 months after the publication of final regulations by the Board.

Section 1301(c) authorizes the Board to conduct a study to determine the types of information available to potential borrowers from consumer credit lending institutions regarding factors qualifying potential borrowers for credit, repayment requirements, and the consequences of default. The provision specifies the factors that should be considered. The findings of such study must be submitted to Congress and include recommendations for legislative initiatives, based on the Board's findings.

Section 1302. Enhanced disclosure for credit extensions secured by a dwelling

Section 1302(a)(1) amends section 127A(a)(13) of the Truth in Lending Act to require a statement in any case in which the extension of credit exceeds the fair market value of a dwelling specifying that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes.

Section 1302(a)(2) amends section 147(b) of the Truth in Lending Act to require an advertisement relating to an extension of credit that may exceed the fair market value of a dwelling and such advertisement is disseminated in paper form to the public or through the Internet (as opposed to dissemination by radio or television) to include a specified statement. The statement must disclose that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

With respect to non-open end credit extensions, section 1302(b)(1) amends section 128 of the Truth in Lending Act to require that a consumer receive a specified statement at the time he or she applies for credit with respect to a consumer credit transaction secured by the consumer's principal dwelling and where the credit extension may exceed the fair market value of the dwelling must contain a specified statement. The statement must disclose that the interest on the portion of the credit extension that exceeds the dwelling's fair market value is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

Section 1302(b)(2) requires certain advertisements disseminated in paper form to the public or through the Internet that relate to a consumer credit transaction secured by a consumer's principal dwelling where the extension of credit may exceed the dwelling's fair market value to contain specified statements. These statements advise that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

Section 1302(c)(1) requires the Board to promulgate regulations implementing the amendments effectuated by section 1402. Section 1302(c)(2) provides that the these regulations shall not take effect until the later of 12 months following the Act's enactment date or 12 months after the date of publication of such final regulations by the Board.

Section 1303. Disclosures related to "introductory rates"

Section 1303(a) amends section 127(c) of the Truth in Lending Act by adding a provision add further requirements for applications, solicitations and related materials that are subject to section 127(c)(1). With respect to an application or solicitation to open a credit card account and all promotional materials accompanying such application or solicitation involving an "introductory rate" offer, such materials must do the following if they offer a temporary annual percentage rate of interest:

(2) use the term "introductory" in immediate proximity to each listing of the temporary annual percentage interest rate applicable to such account;

(3) if the annual percentage interest rate that will apply after the end of the temporary rate period will be a fixed rate, the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period must be clearly and conspicuously stated in a prominent location closely proximate to the first listing of the temporary annual percentage rate;

(4) if the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect 60 days before the date of mailing of the application or solicitation must be clearly and conspicuously stated in a prominent location closely proximate to the first listing of the temporary annual percentage rate.

The second and third provisions described above do not apply with respect to any listing of a temporary annual percentage rate on an envelope or other enclosure in which an application or solicitation to open a credit card account is mailed.

With respect to an application or solicitation to open a credit card account for which disclosure is required pursuant to section 127(c)(1), section 1303(a) specifies that certain statements be made if the rate of interest is revocable under any circumstance or upon any event. The statements must be clearly and conspicuously appear in a prominent manner on or with the application or solicitation. The disclosures include a general description of the circumstances that may result in the revocation of the temporary annual percentage rate and an explanation of the type of interest rate that will apply upon revocation of the temporary rate.

To implement this provision, section 1303(b) amends section 127(c) to define various relevant terms and requires the Board to promulgate regulations. The provision does not become effective until the earlier of 12 months after the Act's enactment date or 12 months after the date of public of such final regulations.

Section 1304. Internet-based credit card solicitations

Section 1304(a) amends section 127(c) of the Truth in Lending Act to require any solicitation to open a credit card account for an open end consumer credit plan through the Internet or other interactive computer service to clearly and conspicuously include the disclosures required under section 127(c)(1)(A) and (B). It also specifies that the disclosure required pursuant to section 127(c)(1)(A) be readily accessible to consumers in close proximity to the solicitation and be updated regularly to reflect current policies, terms, and fee amounts applicable to the credit card account. Section 1304(a) defines terms relevant to the Internet.

Section 1304(b) requires the Board to promulgate regulations implementing this provision. It also provides that the amendments effectuated by section 1404 do not take effect until the later of 12 months after the Act's enactment date or 12 months after the date of publication of such regulations.

Section 1305. Disclosures related to late payment deadlines and penalties

Section 1305(a) amends section 127(b) of the Truth in Lending Act to provide that if a late payment fee is to be imposed due to the obligor's failure to make payment on or before a required payment due date, the billing statement must specify the date on which that payment is due (or if different the earliest date on which a late payment fee may be charged) and the amount of the late payment fee to be imposed if payment is made after such date.

Section 1305(b) requires the Board to promulgate regulations implementing this provision. The amendments effectuated by this provision and the regulations promulgated thereunder shall not take effect until the later of 12 months after the Act's enactment date or 12 months after the date of publication of the regulations.

Section 1306. Prohibition on certain actions for failure to incur finance charges

Section 1306(a) amends section 127 to add a provision prohibiting a creditor of an open end consumer credit plan from terminating an account prior to its expiration date solely because the consumer has not incurred finance charges on the account. The provision does not prevent the creditor from terminating such account for inactivity for three or more consecutive months.

Section 1306(b) requires the Board to promulgate regulations implementing the amendments effectuated by section 1306(a) and provides that they do not become effective until the later of 12 months after the Act's enactment date or 12 months after the date of publication of such final regulations.

Section 1307. Dual use credit card

Section 1307(a) provides that the Board may conduct a study and submit a report to Congress containing its analysis of consumer protections under existing law to limit the liability of consumers for unauthorized use of a debit card or similar access device. The report must include recommendations for legislative initiatives, if any, based on its findings.

Section 1307(b) provides that the Board, in preparing its report, may include analysis of section 909 of the Electronic Fund Transfer Act to the extent this provision is in effect at the time

of the report and the implementing regulations. In addition, the analysis may pertain to whether any voluntary industry rules have enhanced or may enhance the level of protection afforded consumers in connection with such unauthorized use liability and whether amendments to the Electronic Fund Transfer Act or implementing regulations are necessary to further address adequate protection for consumers concerning unauthorized use liability.

Section 1308. Study of bankruptcy impact of credit extended to dependent students

Section 1308 directs the Board of Governors of the Federal Reserve to study the impact that the extension of credit to dependents (defined under the Internal Revenue Code of 1986) who are enrolled in postsecondary educational institutions has on the rate of bankruptcy cases filed. The report must be submitted to the Senate and House of Representatives no later than one year from the Act's enactment date.

Section 1309. Clarification of clear and conspicuous

Section 1309(a) requires the Board (in consultation with other Federal banking agencies, the National Credit Union Administration Board, and the Federal Trade Commission) to promulgate regulations not later than six months after the Act's enactment date to provide guidance on the meaning of the term "clear and conspicuous" as it is used in section 127(b)(11)(A), (B) and (C) and section 127(c)(6)(A)(ii) and (iii) of the Truth in Lending Act.

Section 1309(b) provides that regulations promulgated under section 1309(a) shall include examples of clear and conspicuous model disclosures for the purposes of disclosures required under the Truth in Lending Act provisions set forth therein.

Section 1309(c) requires the Board, in promulgating regulations under this provision, to ensure that the clear and conspicuous standard required for disclosures made under the Truth in Lending Act provisions set forth in section 1309(a) can be implemented in a manner that results in disclosures which are reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

Section 1310. Enforcement of certain foreign judgements barred

Section 1310(a) provides that notwithstanding any other provision of law or contract, a court within the United States shall not recognize or enforce any judgment rendered in a foreign court if, by clear and convincing evidence, the court in which recognition or enforcement of the judgment is sought determines that the judgment gives effect to any purported right or interest derived, directly or indirectly, from any fraudulent misrepresentation and fraudulent omission that occurred in the United States during the period beginning on January 1, 1975, and ending on December 31, 1993.

Section 1310(b) provides that section 1310(a) shall not prevent recognition or enforcement of a judgment rendered in a foreign court if the foreign tribunal rendering judgment giving effect to the right or interest concerned determines that no fraudulent misrepresentation or fraudulent omission described in section 1310(a) occurred.

TITLE XIV. GENERAL EFFECTIVE DATE; APPLICATION OF AMENDMENTS

Section 1401. Effective date; application of amendments

Section 1401(a) states that the Act shall take effect 180 days after the date of enactment, unless otherwise specified in this Act.

Section 1401(b) provides that the amendments made by this Act shall not apply with respect to cases commenced under the Bankruptcy Code before the Act's effective date, unless other specified in this Act.